v. 2896 No. 14424

United States
Court of Appeals
for the Ninth Circuit.

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Alaska,
Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 12-10-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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In the District Court for the Territory of Alaska, Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., an Alaska Corporation; NELSE MORTENSEN, CLIFF MORTENSEN and FRANK V. HENDERSON, Individually and as Directors and Stockholders of Fairview Development, Inc., and for and on Behalf of All Other Stockholders of Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and Director of Bayview Realty, Inc., an Alaska Corporation, and Fairview Development, Inc.; EVERETT NOWELL, Individually and as an Officer and Director of Bayview Realty, Inc., and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation, and BANK OF FAIRBANKS, a Corporation,

Defendants.

COMPLAINT

Come Now the plaintiffs and for cause of action against the defendants complain and allege as follows:

I.

That the plaintiff Fairview Development, Inc.,

is a corporation duly organized and existing under and by virtue of the Laws of the Territory of Alaska, and has paid its annual corporation tax last due, and has filed its annual report for the last calendar year.

II.

That the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson are stockholders of the plaintiff Fairview Development, Inc., each of said plaintiffs owning 150 shares of the common capital stock of said Fairview Development, Inc., and collectively owning 50% of the common capital stock of said corporation. Said 450 shares of said capital stock also represent 50% of the voting stock of said corporation. The plaintiff Cliff Mortensen is a director and officer of said plaintiff corporation. This action is brought on behalf of said plaintiffs and all other stockholders of said Fairview Development, Inc., and for their benefit.

III.

That the defendants Cash Cole and Everett Nowell are officers and directors of Fairview Development, Inc., the plaintiff corporation, and are officers, directors and stockholders of Bayview Realty, Inc., the defendant corporation.

IV.

That said Bayview Realty, Inc., is an Alaska corporation organized and existing under the laws of the Territory of Alaska with its principal place of business at Fairbanks, Alaska. Said defendant

Bayview Realty, Inc., is the owner of 50% of the capital common stock of the plaintiff Fairview Development, Inc., comprising 450 shares of said capital stock, which also represents 50% of the voting stock of said corporation. The defendants Cash Cole and Everett Nowell control said defendant Bayview Realty, Inc.

V.

That the defendant First National Bank of Fairbanks is a national banking corporation, organized and existing under the laws of the United States, conducting a general banking business in the Territory of Alaska, having its principal place of business at Fairbanks, Alaska, within the jurisdiction of this court.

VI.

That the defendant Bank of Fairbanks is a banking corporation, organized and existing under the laws of the Territory of Alaska, conducting a general banking business in the Territory of Alaska, having its principal place of business at Fairbanks, Alaska, within the jurisdiction of this court.

VII.

That the plaintiff Fairview Development, Inc., was organized for the purpose of obtaining a Federal Housing Administration insured loan to provide funds for the construction of a large apartment housing project in Fairbanks, Alaska. Said plaintiff corporation obtained an insured mortgage loan for the construction of an apartment housing project

now known as Fairview Manor, situated in Fairbanks, Alaska, upon lands leased by the plaintiff corporation from the City of Fairbanks for a term of 75 years, and did construct said housing project.

VIII.

That as the apartment units were completed in said housing project, and ready for occupancy, the defendants Cash Cole and Everett Nowell, acting individuallly or as officers, directors and stockholders of Bayview Realty, Inc., or both, and on their own behalf, or on behalf of said Bayview Realty, Inc., did wrongfully usurp and take unto themselves, without any authority, possession of the premises and the control of said apartment housing project, collecting the rentals therefrom, controlling the project and disbursing the rentals at will and without accounting to the plaintiffs Fairview Development, Inc., Cliff Mortensen, Nelse Mortensen or Frank V. Henderson, all without any right or authority whatsoever.

IX.

That since taking over the operation of said apartment housing project, the said defendants Cash Cole and Everett Nowell, acting for themselves or Bayview Realty, Inc., or both, have without right or authority paid themselves from the rentals and funds belonging to the plaintiff Fairview Development, Inc., salaries and expenses never approved or authorized by the plaintiff Fairview Development, Inc., or the board of directors of said plaintiff Fairview Development, Inc., and without

the authority and approval of the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson. Said salaries and withdrawals have been exorbitant, beyond all proportion to services rendered and without lawful authority or legal right. In addition thereto said defendants Cash Cole and Everett Nowell have occupied apartments in said project rent free likewise without any authority or approval of the plaintiff Fairview Development, Inc., or its board of directors, or of any of the plaintiffs. Said defendants Cash Cole and Everett Nowell have further and without any legal right or legal authority paid to themselves from the funds of the plaintiff Fairview Development, Inc., large expenses and costs of living for themselves and their families while sojourning beyond the limits of the City of Fairbanks, and not in the furtherance of any interest or business of the plaintiff Fairview Development, Inc., or said Fairview Manor project. Said defendants have wholly failed and refused to account for and to pay to the plaintiff Fairview Development, Inc., the funds received by them from rentals and other income from said project. Said defendants have failed: To account for the funds belonging to the plaintiff corporation to the board of directors of said corporation; or to obtain the approval of said board of directors or of the stockholders for the withdrawal of funds for their own benefit or for the payment to themselves of exorbitant salaries and expenses; or to have said board or stockholders fix any salaries, or approve their

free rentals, or appoint them as agents, or authorize special or extraordinary disbursements or expenses or costs, or determine corporate policies, or exercise corporate powers, to the detriment, loss and damage of plaintiff Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation.

X.

That the defendants Cash Cole and Everett Nowell, acting for and on their own behalf or for and on behalf of Bayview Realty, Inc., or both, have by numerous acts and deeds, taken unto themselves, without right or authority, the operation, management and direction of the property of the plaintiff Fairview Development, Inc., a corporation, or the determination of corporate policies, or exercise of corporate powers, to the detriment, loss and damage of the plaintiff Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation and contrary to the General Laws of the Territory of Alaska, or the Articles of Incorporation or the Bylaws of said plaintiff corporation.

XI.

That on June 16, 1950, an agreement was entered into by and between the defendants Cash Cole, Everett Nowell and Bayview Realty Inc., as parties of the first part, and the plaintiff Cliff Mortensen, as party of the second part, a copy of which agreement is in the possession of the defendants, providing that the plaintiff Cliff Mortensen should have one vote as a director of said Fairview Develop-

ment, Inc., and that the defendants Cash Cole and Everett Nowell together should have one vote as a director of the plaintiff Fairview Development, Inc., and further providing that any action requiring the vote or approval of Fairview Development, Inc., must be unanimously agreed to by said plaintiff Cliff Mortensen on the one hand and said defendants Cash Cole and Everett Nowell on the other hand, and that no action taken by the board of directors of Fairview Development, Inc., without such unanimous approval would be binding, nor would such action be the act of Fairview Development, Inc., without such unanimous approval. Said contract further provided that in the event an agreement could not be had by the plaintiff Cliff Mortensen as a director on one hand and the defendants Cash Cole and Everett Nowell together as directors on the other hand, that such matter shall be submitted to Ken Kadow, of Juneau, Alaska, for decision, and his decision would be controlling and binding and the action to be taken by the plaintiff corporation; and in the event said Ken Kadow was not available, then said matter should be submitted to Roy Sumpter, whose determination shall be the action of the plaintiff corporation.

XII.

That the defendants Cash Cole and Everett Nowell in violation of said agreement have attempted to act for and on behalf of the plaintiff corporation without any authority or right whatsoever, and have disbursed and paid funds in sub-

stantial amounts belonging to the plaintiff corporation to themselves as aforesaid without the approval of the board of directors, or of the stockholders of the plaintiff corporation. Said defendants have failed and refused to submit matters which could not be settled by the board of directors of plaintiff corporation to Ken Kadow, but have entirely ignored the board of directors and the stockholders of said corporation. Said defendants Cash Cole and Everett Nowell have usurped the authority and powers of the plaintiff corporation, and have failed and neglected to call or hold any annual meeting of the stockholders as required by the Bylaws of the corporation.

XIII.

That the defendant First National Bank of Fairbanks has on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants Cash Cole and Everett Nowell without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said monies will be used for other than corporate purposes, all to the damage of the plaintiff Fairview Development, Inc., and the stockholders of said plaintiff corporation unless said defendant bank is restrained and enjoined from disbursing said funds upon the orders or direction of the defendants Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

XIV.

That the defendant Bank of Fairbanks has on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants Cash Cole and Everett Nowell without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said monies will be used for other than corporate purposes, all to the damage of the plaintiff Fairview Development, Inc., and the stockholders of said plaintiff corporation unless said defendant bank is restrained and enjoined from disbursing said funds upon the orders or direction of the defendants Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

XV.

That although the plaintiff Fairview Development, Inc., is fully solvent, a deadlock exists on the board of directors of said corporation and among the stockholders of said corporation on matters vitally affecting the welfare and best interests of said corporation; that the officers and directors of said plaintiff corporation are unable to agree upon matters affecting the life or affairs of said corporation; that the common stock ownership is evenly divided between opposing factions and an impasse exists between such factions both on the board of directors thereof and among the stockholders thereof. No decision or action can be taken or had by the plaintiff Fairview Development, Inc.,

for the protection of its assets and property for the benefit of all stockholders by reason of said deadlock.

That the defendants Everett Nowell and Cash Cole called a special meeting of the board of directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; that the plaintiff Cliff Mortensen made a special trip from Seattle to Fairbanks, Alaska, to attend said special meeting of the directors; that at the meeting of the directors the defendants Everett Nowell and Cash Cole refused to permit any record or minutes of the meeting to be kept or taken and refused to permit the plaintiff Cliff Mortensen to make any motions or act upon any motions or matters concerning the corporation; that the plaintiff Cliff Mortensen made a number of motions which said defendants refused to consider or act upon. In spite of said deadlock they nevertheless refused to submit such matters to Ken Kadow or Roy Sumpter as provided in the agreement hereinbefore mentioned in section XI hereof. Moreover the defendant Cash Cole became very abusive and walked out of the meeting and insisted that the defendant Everett Nowell leave the meeting and the defendant Everett Nowell did so in order to prevent any matters or business being conducted by the directors for the corporation. The actions of the defendants Cash Cole and Everett Nowell were such as to prevent any future or further meetings of the directors for the transac-

tion of any business on behalf of the plaintiff corporation, as any such further meetings could only result in the same abusive action and refusal to consider any matters except those that the defendants Cash Cole or Everett Nowell might be interested in at the moment.

That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of said deadlock on said board of directors and among the stockholders; that irreparable injury and damage will be done to the plaintiff Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection; that there exists no plain, speedy and adequate remedy at law.

Wherefore, the plaintiffs pray for judgment and decree of this court as follows:

1. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, be required to render a full and complete accounting of all funds received by them, or any of them, belonging to and the property of the plaintiff Fairview Development, Inc., together with a full accounting of all disbursements made by them, or any of them, from funds of the plaintiff corporation, or purportedly on behalf of said plaintiff corporation, and that said defendants be further required to account for the reasonable rental value

of any apartments belonging to the plaintiff corporation and occupied by said defendants, and upon said accounting that the plaintiff corporation have judgment against the defendants for amounts found due, together with legal interest thereon.

2. That the court issue a temporary restraining order temporarily restraining and enjoining said defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, from receiving, or collecting, or disbursing any funds of the plaintiff Fairview Development, Inc., and requiring said defendants to vacate any apartments occupied by them belonging to the plaintiff corporation, and for which they have failed to pay any rentals.

3. That the court issue a temporary restraining order temporarily restraining and enjoining the defendants First National Bank of Fairbanks, and Bank of Fairbanks from disbursing any funds presently on deposit with said defendants, or either of them, and belonging to the plaintiff corporation, or standing in the name of the plaintiff corporation, or hereafter received in the name of the plaintiff corporation, except upon checks signed in accordance with such order as the court may enter herein.

4. That the court issue an order pendente lite appointing a disinterested party to take over the management and operation of said Fairview Manor apartments at Fairbanks, Alaska, collect all income therefrom and make all disbursements for current

operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

5. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor apartments, or any other matter relating to said project, or to the affairs of said corporation.

6. That the plaintiffs have such other and further relief as to the court may seem just and equitable in the premises, together with the plaintiffs' costs and disbursements herein to be taxed, including reasonable attorneys' fees incurred in this behalf.

COLLINS & CLASBY,

By /s/ WALTER SCZUDLO,

Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed October 31, 1952.

[Title of District Court and Cause.]

ANSWER

Come now Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaska Corporation and Fairview Development, Inc.; Everett Nowell, individually and as an officer and direc-

tor of Bayview Realty, Inc., and Fairview Development, Inc.; Bayview Realty, Inc., an Alaska corporation, and answer to the complaint on file herein admit, deny and allege as follows:

I.

Answering paragraph I of the Complaint on file herein these answering defendants admit the allegations contained therein.

II.

Answering paragraph II of the Complaint on file herein these answering defendants deny each allegation therein contained.

III.

Answering paragraph III of the complaint on file herein these answering defendants admit the allegations therein contained.

IV.

Answering paragraph IV of the complaint on file herein these answering defendants admit that the said Bayview Realty, Inc., is an Alaska corporation, organized and existing under the laws of the Territory of Alaska with its principal place of business at Fairbanks, Alaska. Said defendants, Bayview Realty, Inc., is the owner of at least 50% of the capital common stock of the plaintiff, Fairview Development, Inc., comprising at least 450 shares of said capital stock which also represents at least 50% of the voting stock of said corporation. These answering defendants further admit that Cash Cole

and Everett Nowell control the Defendant, Bayview Realty Co., Inc.

V.

Answering Paragraph V of the Complaint on file herein these answering defendants admit the same.

VI.

Answering paragraph VI of the Complaint on file herein these answering defendants admit the same.

VII.

Answering paragraph VII of the Complaint on file herein these answering defendants admit that the plaintiff, Fairview Development, Inc., was organized for the purpose, among other purposes of constructing an apartment housing project at Fairbanks, Alaska, upon land leased from the City of Fairbanks, which said land was originally leased by Bayview Realty Co., Inc., from the said City of Fairbanks, Alaska, for a period of 75 years; that plaintiff, Fairview Development, Inc., did obtain a loan from the National Bank of Commerce, a national Banking corporation organized and existing under the laws of the United States, located in the City of Seattle, Washington; that the plaintiff Fairview Development, Inc., did enter into a contract with Nelse Mortensen, Alaska, Inc., an Alaska corporation for the construction of said housing project, and that the said Nelse Mortensen, Alaska, Inc., did enter upon the construction of said housing project. These answering defendants deny each and every other allegation therein contained.

VIII.

Answering paragraph VIII of complaint on file herein there answering defendants admit that as apartment units were ready for occupancy that Cash Cole and Everett Nowell acting pursuant to the terms of agreements previously made between plaintiffs and these answering defendants and with the knowledge, consent and approval of the plaintiff did manage and operate and are managing and operating said units and housing project on behalf of Fairview Development, Inc., these answering defendants deny each and every other allegations therein contained.

IX.

Answering paragraph IX of complaint on file herein these answering defendants admit that they have conducted the management and operation of said units and housing project pursuant to the agreements heretofore referred to all with the knowledge, approval and consent of the plaintiffs. These answering defendants further admit that they have accounted to plaintiff and all other necessary parties in accordance with the agreements heretofore referred to and with the knowledge, consent and approval of plaintiff and in this regard have retained Herbert Lofquist, an accountant, to conduct the bookkeeping and accounting of said operation and management, all pursuant to the agreements heretofore referred to and with the consent, approval and knowledge of plaintiffs; these answering defendants deny each and every other allegation therein contained.

X.

Answering paragraph X of the complaint on file herein these answering defendants deny each, every and all allegations therein contained.

XI.

Answering paragraph XI of the complaint on file herein these defendants admit that an agreement was entered into by and between Cash Cole and Everett Nowell and Bayview Realty, Inc., as parties of the first part and Cliff Mortensen as party of the second part on June 16, 1950. These answering defendants deny each and every other allegation therein contained.

XII.

Answering paragraph XII of the complaint on file herein these answering defendants deny each and every and all allegations therein contained.

XIII.

Answering paragraph XIII of the complaint on file herein these answering defendants admit that the defendant, First National Bank of Fairbanks, has on deposit, funds of Fairview Development, Inc., these answering defendants deny each and every other allegation therein contained.

XIV.

Answering paragraph XIV of the complaint on file herein these answering defendants admit that the defendant, Bank of Fairbanks, has on deposit funds of Fairview Development, Inc., these answer-

ing defendants deny each and every other allegation therein contained.

XV.

Answering paragraph XV of the complaint on file herein these answering defendants admit that Everett Nowell called a special meeting of the Board of Directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; and these answering defendants further admit that Cliff Mortensen attended said special meeting. These answering defendants deny each and every other allegation therein contained.

Wherefore, these answering defendants having fully answered the complaint of the plaintiffs, pray for a decree of this court as follows:

1. That the complaint on file herein be dismissed with prejudice.

2. That these answering defendants have their costs and disbursements expended, including reasonable fees incurred in their behalf.

MORRISSEY, HEDRICK,

ROBERTS & DUNHAM,
Attorneys for Answering
Defendants.

Duly verified.

[Endorsed]: Filed December 17, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR APPOINTMENT OF RECEIVER AND TEMPORARY INJUNCTION

State of Washington,
County of King—ss.

The undersigned, Cash Cole, being first duly sworn on oath deposes and says:

1. That he is a citizen of the United States and of the Territory of Alaska; that he is over the age of twenty-one years and sui juris.

2. That he is one of the defendants in the above-entitled cause; that the above-named action is brought by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; that insofar as Fairview Development, Inc., an Alaska corporation, is concerned, no authority or official action of said corporation has been taken by said corporation officers to bring this law suit; that in plaintiff's complaint and affidavit it is alleged that such action was brought on behalf of the named individual plaintiffs and all other stockholders of Fairview Development, Inc., the facts being, however, that there is no common stock of Fairview Development, Inc., owned by anyone other than the three named plaintiffs herein and Cole, Nowell and Bayview, Inc.; that there is issued one hundred shares of preferred stock of the value of $1.00 per share which have been issued to the Federal Housing Administration, Agency of the United States Government, but that these plaintiffs

nor their attorneys have no power or authority to bring any suit for the United States Government or any other agencies in this matter.

3. That Fairview Development, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska with its principal place of business in Fairbanks, Alaska; that the said corporation is the owner of a leasehold of real estate in the Territory of Alaska which leasehold is improved by an apartment building.

4. That Nelse Mortensen, Alaska, Inc., was a corporation organized and existing under and by virtue of the law of the State of Washington with its principal place of business in Seattle, King County, Washington; that Nelse Mortensen, Alaska, Inc., was dissolved by the individual plaintiffs herein, namely Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson; that the named individuals were all of the directors and shareholders thereof; that possession and control of all the assets of the corporation was taken by the said individuals; that all the liabilities of the corporation were assumed by them and that these individuals hold the assets of the corporation as Trustees for the corporation and as Trustees are obligated for the liabilities for the corporation; that the said individuals, namely Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson are co-partners doing business as Nelse Mortensen Alaska Company.

5. That on or about July 10, 1950, Fairview Development, Inc., as owner, entered into a written

construction contract with Nelse Mortensen, Alaska, Inc., a corporation, for the construction of a multiple housing or apartment building on the leasehold estate owned by Fairview Development, Inc. Said building was to be known as Fairview Manor Apartments and Fairview Development, Inc., agreed to pay Nelse Mortensen, Alaska, Inc., an agreed price of $3,080,000.00 for said construction; that thereafter the individual plaintiffs, namely, Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson, acting as Trustees of Nelse Mortensen, Alaska, Inc., and as co-partners, doing business as Nelse Mortensen Alaska Company undertook to perform the obligations of the contract, assumed all the liabilities of the contract and then performed certain work in the construction of the building to be constructed pursuant to the terms of the contract and obtained from Fairview Development, Inc., all of the $3,080,000.00.

6. That the defendant, Everett Nowell, is the regularly and duly elected and acting President of Fairview Development, Inc.; that the defendant, Cash Cole, is the regularly and duly elected and acting Secretary-Treasurer of Fairview Development, Inc.; that both Cash Cole and Everett Nowell are duly and regularly elected and acting Directors of Fairview Development, Inc.; that the minutes and records of Fairview Development, Inc., substantiate that statement.

7. That the Board of Directors of Fairview Development, Inc., consists of three members only, the

third member besides Cash Cole and Everett Nowell being Cliff Mortensen.

8. That Bayview Realty, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska; that Cash Cole and Everett Nowell own all of the stock of Bayview Realty, Inc.; that they constitute the Board of Directors of said corporation; that they are the officers of said corporation and control said corporation.

9. That on the 15th day of June, 1950, a contract and agreement was entered into by and between Bayview Realty, Inc., an Alaska corporation, Cash Cole and Everett Nowell as parties of the First Part, and Nelse Mortensen, Cliff Mortensen and Frank V. Henderson as parties of the Second Part wherein among other things it was agreed as follows:

Upon the completion of the construction of said housing project at Fairbanks, Alaska, Bayview Realty, Inc., shall have the management and operation of the building and the completed project on behalf of Fairview Development, Inc.

10. That on the 3rd day of August, 1951, at 10:00 o'clock in the forenoon of said day, a special meeting of the Board of Directors of Fairview Development, Inc., was regularly and duly called upon notice, by its President, Everett Nowell; that all of the Directors of Fairview Development, Inc., were present,

namely Everett Nowell, Cash Cole and Cliff Mortensen; that the purpose of said meeting was to effectuate the management contract and understanding of the parties and enter into a contract for the management of the apartment house; that at said meeting, a proper resolution was passed which provided that a contract should be executed by and between Fairview Development, Inc., and Bayview Realty, Inc., whereby Bayview Realty, Inc., would assume the management of Fairview Development, Inc., in that apartments were then becoming available for occupancy, and that Fairview Development, Inc., was to pay Bayview Realty, Inc., a fee of five per cent (5%) of the total income of Fairview Development, Inc., with a minimum guarantee of not less than $2,000.00 per month, plus all expenses incurred by the Bayview Realty, Inc. It was further decided in said resolution that the sole owners of Bayview Realty, Inc., were Cash Cole and Everett Nowell, and that in the event that Cash Cole and Everett Nowell decided to dissolve Bayview Realty, Inc., as a corporation and operate Bayview Realty, Inc., as individuals, that in such case, the provisions of the contract would apply to Everett Nowell and Cash Cole; that thereafter on the 1st day of December, 1951, an agreement was executed by and between Bayview Realty, Inc., and Fairview Development, Inc., embodying the terms of said resolution.

11. That at all times Cash Cole and Everett Nowell, or either of them, acting as officers and Directors of Fairview Development, Inc., and as

officers and directors of Bayview Realty, Inc., and as individuals, have used their best efforts and energy in managing the housing development known as Fairview Development, Inc.; that it was necessary for Everett Nowell and Cash Cole, as President and Secretary-Treasurer, respectively, of Fairview Development, Inc., to manage said project and if they had not managed said project, Fairview Development, Inc., would now be insolvent, the housing project would be unfit for occupancy and the property and assets of Fairview Development, Inc., would be owned and controlled by the mortgage lender.

12. That Cash Cole and Everett Nowell have been managing the apartment, collecting the rentals, and disbursing the rentals all with the best interest of the project and the corporation in mind.

13. That Fairview Development, Inc., by and through the action of all of its Directors retained the firm of Pritchard and Lofquist, Certified Public Accountants, 1711 Exchange Building, Seattle 4, Washington; that Mr. Herbert Lofquist of said firm and who is a Certified Public Accountant himself set up a system of books when the housing project was first opened for occupancy; he was instructed to institute and did institute a plan of accounting and a system of receiving and disbursing the money. The accounting system set up by Mr. Lofquist has been followed consistently since its institution and is still being maintained at the office of Fairview Development, Inc., at Fairbanks,

Alaska. The books at all times and now are open for inspection to any person qualified to look at them including the Directors and Stockholders of the corporation; Mr. Lofquist made regular inspection of the books and accounts up to January 1, 1953; he made a quarterly report which was issued to all stockholders; Mr. Lofquist was retained by Fairview Development, Inc. On January 1, 1953, Fairview Development, Inc., lost one hundred tenants at one time, due to Army regulations and conditions beyond the control of the management of Fairview Development, Inc. This loss created a drastic situation which resulted in drastic economies so the services of Mr. Lofquist were dispended with; however, at all times since the opening of the project, these books have been kept by a bookkeeper, Mrs. Arnoldine Scott, a woman chosen and hired by accountant Lofquist. She at all times has been under bond and is still an employee of Fairview Development, Inc. She is in charge of all collections and bank deposits and makes out vouchers for expenditures. That the statement that these defendants have controlled the project and disbursed rentals at will and without accounting to plaintiffs or any one or more of them is false and without any basis whatsoever.

14. Cash Cole and Everett Nowell since the project has been opened have spent time managing said project and protecting the property. For such work they have received a salary; this is justified due to the fact that they are President and Secretary-

Treasurer of the corporation, Directors of the corporation, plus the fact that such payments are justified by the action of the Board of Directors of August 3, 1951. Everett Nowell received a salary from the time the said project opened for occupancy up until January 1, 1953; at that time drastic economies were necessary so Everett Nowell took himself off the payroll; up to that time, he spent much time in the management of the project. No expenses have been paid by Fairview Development, Inc., to Everett Nowell or Cash Cole for themselves and their families while sojourning beyond the limits of the city of Fairbanks except for actual traveling expenses of the two individuals themselves and their actual expenses while out of the City of Fairbanks, transacting business for Fairview Development, Inc. Any charge that expenses have been charged to Fairview Development, Inc., for living for themselves and their families while away from Fairbanks, Alaska, is false, untrue and without basis.

15. That Cash Cole and Everett Nowell have occupied apartments in said housing project; that said occupancy is necessary for the proper management and protection of said property; that Everett Nowell as President and Cash Cole as Secretary-Treasurer have called numerous Directors meetings of the Directors of Fairview Development, Inc., for the proper conduct of the affairs of said corporation; they have always kept proper minutes of said meet-

ings and that in substantiation of this the Minute Book of said corporation will show such to be true.

16. That the individual plaintiffs herein, namely Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have, as stated above, individually assumed the liabilities and responsibilities of that certain contract for the construction of the project. That the said three individuals refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, interest on the mortgage due January 1, 1952, in the amount of $9,075.26 and thirty days delinquent interest in the amount of $30.25 and interest on mortgage due February 1, 1952, in the amount of $9,194.00; they further refused and neglected to pay real estate taxes levied August 1, 1951, in the sum of $31,612.00 and that due to such neglect and failure and refusal of those three individuals to make the required payments, these defendants as officers, directors and managers of Fairview Development, Inc., were required to make such payments from the assets of Fairview Development, Inc.

17. That the said three plaintiffs individually in their respective capacities have failed and neglected to complete the construction of Fairview Manor Apartment project according to the terms and provisions of the contract; that because of such failure to complete and properly construct said project and because of their failure to pay the sums of money above, it has been necessary for Fairview Develop-

ment, Inc., to bring suit against the three individuals named herein and their wives and their respective marital communities to recover the sum of $699,912.27; that said suit is presently on file in the District Court of the United States for the Western District of Washington, Northern Division.

18. That in spite of the inadequacies of the construction by the plaintiffs herein individually and further in spite of the fact that they have received the entire $3,080,000.00 for the construction of the project and have failed to pay substantial sums of money required by them to be paid, the management of this project has been carried on in a remarkably efficient and proper manner; in substantiation of this attached hereto is a copy of a letter directed to Fairview Development, Inc., and by this reference made a part hereof. This letter is from J. C. Campbell, Vice-President and Manager, Mortgage Loan Department, Seattle Trust and Savings Bank, who is servicing the underlying mortgage on the project for Institutional Securities Corporation of New York. One paragraph of the attached letter should be emphasized as follows:

> "First I want to compliment you on the work that has been to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can-

not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project."

19. That plaintiffs allege in their complaint on file herein that defendants, Everett Nowell and Cash Cole, call a special meeting of the Board of Directors of Fairview Development, Inc., on October 29, 1952, in Fairbanks, Alaska; that plaintiff Cliff Mortensen was present and that Nowell and Cole refused to permit any records or minutes to be kept or taken and further refused to allow Cliff Mortensen to make any motions or act upon any motions or matters concerning the corporation and further refused to submit the matter to Ken Kadow and Roy Sumptor. The true facts of the situation are as follows: Everett Nowell as President of the Corporation sent out notice to the directors of the corporation that a special meeting for the specific purpose of discussing the feasibility of construction of an additional light plant, as the corporation was confronted with problems coming up that winter with reference to the light and electricity. Cliff Mortensen voted "No" upon the proposed proposition; Cash Cole and Everett Nowell voted "Yes." After the matter was discussed, which was the only matter to be discussed in the special meeting, the said meeting was adjourned. Minutes were taken and duly written up and signed by the President and Secretary-Treasurer of the corporation and are part of the records of the corporation. The only

reference to Ken Kadow or Roy Sumptor during the meeting was the fact that Cliff Mortensen suggested that the matter should be referred to one of these gentlemen. Cash Cole and Everett Nowell suggested that the matter should be referred to an electrical expert familiar with the conditions at the project. No action was taken. After the meeting was adjourned, further discussion was had during which either Cliff Mortensen or Cliff Mortensen's attorney who was with him made an accusation concerning Cash Cole of "milking" the company, whereupon Cash Cole walked out.

20. Also listed as defendants in this cause are First National Bank of Fairbanks, a corporation, and Bank of Fairbanks, a corporation. The records of this litigation show an appearance and answer on behalf of the two banking institutions by the same attorney, namely, Walter Sczudlo, attorneys for plaintiff.

21. Therefore, pursuant to the true facts herein set forth, the Complaint filed in the above-entitled cause should be dismissed and a Motion filed herewith be denied.

Dated at Seattle, Washington, this 3rd day of August, 1953.

/s/ CASH COLE.

Subscribed and Sworn to before me this 3rd day of August, 1953.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

30 June, 1953.

Fairview Development, Inc.,
Fairview Manor,
Building #2 Office,
Fairbanks, Alaska.

Attn: Mr. Cash Cole.
Re: ISC Trust T241-1—Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Sirs:

After my inspection of this apartment property, I communicated with the Institutional Securities Corporation of New York, for whom we service the underlying mortgage and we now have their instruction to report to you in detail of our findings on the condition of the buildings and to request that you prepare for us a schedule for repairs, so that some assurance can be given to the Institutional Securities Corporation, that the necessary work is to be done before the arrival of cold weather.

First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing

myself with problems which you have had to face, one can not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.

You must realize that the various claims and interests of the individual owners of the stock of Fairview, and their individual problems are of no concern to the mortgagee or to us as servicing agent for them; our interest at this point is purely one of preservation of the security of the mortgage.

The requirements for the project, as a whole are:

1. Correction of grade of sidewalks, to bring them above the level of the moisture. We recommend that all sidewalks be covered with an additional 5½ to 6 inches, up to the level of the present first steps.

2. A program for interior decoration should be begun, and until some better yardstick is offered, we think the figure in the FHA Project Analysis estimated at $19,168.00 per annum would be an acceptable figure. If interior decorating is done on a program basis, repainting the interiors and trim as necessary, you will not face heavy expenditures with available funds lacking at some future date, and your occupancy should continue to be maintained at a high level.

3. Landscaping and planting has not been satisfactorily completed, and this must be done in order

to comply with the building program. Unless this is done to implement the attractiveness of the project, we feel that competition with other attractive rental units will seriously impair the occupancy of your apartments.

We call to your attention that the National Bank of Commerce here in Seattle, holds a deposit in escrow of $8,800.00, to assure the completion of landscaping and planting; and that it also holds in addition the sum of $1,080.00 for completion of curbs and driveways. We are informed that the FHA has accepted the curbs and driveways and therefore assume that you may now seek the release of those funds; however, we find no record of their acceptance of the landscaping and planting and so we assume that the work must be completed in a manner satisfactory to the FHA and that you may thereafter seek the release of the funds held for that purpose in the aforementioned escrow.

Our review of the individual buildings indicates the following repairs to be necessary, in addition to the above specific requirements for the over-all project:

Building #1: Exterior paint is needed on the west end of Section "E"; on the west end of Section "H"; and on the south side of Section "H." We concluded that these items are urgent for the preservation of the security.

Building #2: Exterior paint is needed on the west side of Section "H"; on the east side of Section "H"; and on the south sides of Sections A, B,

D & E, also G & H; and on the west side of Section "A."

The ridge cover has apparently been damaged either in the process of installing vents on the building or in ice removal, and this should be immediately checked and straightened or replaced.

Also the grade of the driveway should be changed from the rear of the building to carry the water away from the building at Section "G"; to eliminate the possibility of water draining into the boiler room.

Building #3: Exterior paint is badly needed on the west end of Section "H"; on the south side of Section "H," and on east side of Section "H." Also there is evidence of some necessary roof repair on this building and it is recommended that aluminum patches be put over the holes created by ice chopping. It is also noted that the change-over on the 3-way valve was to have been completed during the early part of June, and we should appreciate your confirmation that this work has been satisfactorily completed.

Building #4: Exterior painting is urgently needed on the south and west sides of Section "A"—on the south side of Section "B," and on the east side of Section "H." Also, some of the driveway adjacent to this building has been damaged and should be replaced. During the early part of June you were in the process of completing the change-over onto the 3-way valve in this building also, and we shall

apreciate your advice whether that work has been satisfactorily completed.

In connection with the roof repairs mentioned as necessary regarding Building #3, it may be found that there are additional holes in the roof structures on parts of the other buildings, although we were unable to find them without the proper equipment, and it is suggested therefore that a careful survey of all of the roofs be made by a competent workman, who would make all of such repairs as are found necessary.

We shall appreciate your immediate acknowledgment of this letter, and a detailed report in the very near future of your plan for the maintenance of the property, which we deem so necessary in order to protect the security of the mortgage and to eliminate waste to the property.

Yours very truly,

/s/ J. F. CAMPBELL,
Vice President and Manager,
Mortgage Loan Department.

JFCampbell:awe

Via airmail

Cc—Mr. C. A. Carroll,
FHA Terr. Director,
Juneau, Alaska.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated and Agreed by and between the plaintiffs herein and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen and Co., Inc., and the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., as follows:

1. For and in consideration of the sum of one thousand ($1000) dollars to be paid in cash by Cash Cole, Nelse Mortensen, Cliff Mortensen and Frank Henderson, agree to assign, transfer and convey all of their capital stock in Fairview Development, Inc., to wit, 450 shares of said capital stock to Cash Cole or his assigns.

2. Nelse Mortensen, Cliff Mortensen and Frank Henderson, Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., do hereby release and discharge the defendants above named, and Fairview Development, Inc., from any and all claims, damages, liability or demands whatsoever; and in consideration of such release and discharge of all liability, Fairview Development, Inc., agrees to pay to Nelse Mortensen, Cliff Mortensen and Frank Henderson, the sum of eighty-nine thousand ($89,000) dollars without interest, as herein provided; thirty-seven thousand eight hundred ($37,800) dollars of said payment shall be funds repaid to Nelse Mortensen, Cliff Mortensen and Frank Henderson, heretofore advanced to Fairview Development, Inc., as so-called front money, and the balance of fifty-

one thousand two hundred ($51,200) dollars shall be paid in consideration of the release of any and all claims against Cash Cole, Everett Nowell, Fairview Development, Inc., and Bayview Realty, Inc., and in settlement of all disputes between the parties. Said payment shall be made to the parties jointly, or may be divided equally and paid to each of them as may be directed by the said parties. Said sum in the release and settlement of any and all liability against the parties as provided herein shall be paid in the following manner; $6800.00 at this time and $3200.00 on or before December 31, 1953, and $5,000.00 payable April 15, 1954, and quarterly thereafter (every 3 months) annually, until the full sum of $89,000.00 has been paid, without interest. It is understood and agreed that said obligation in the sum of $89,000.00 shall be secured by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., placing in escrow all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares by this agreement purchased by said persons, and 450 shares of said capital stock owned by Bayview Realty, Inc. In the event of any default in the payment of any installment required to be made, said Nelse Mortensen, Cliff Mortensen and Frank Henderson may immediately declare the full balance of said obligation due and owing and may require the escrow holder to deliver said capital stock to them as their property, conveying all right, title and interest in and to all of said capital stock, except said 100 shares of preferred stock, to Nelse Mortensen, Cliff

Mortensen and Frank Henderson in full satisfaction of the sum of $89,000.00, or such balance as may remain due at that time. It is further understood and agreed that Cash Cole, Everett Nowell and/or Bayview Reatly, Inc., may deliver, or cause to be delivered, all the said capital stock, to wit, 900 shares of the capital stock of Fairview Development, Inc., (not including 100 shares of preferred stock), to Nelse Mortensen, Cliff Mortensen and Frank Henderson in full settlement of said obligation of $89,000.00, or any balance thereon remaining at any time that said obligation may be in default. Fairview Development, Inc., Bayview Realty, Inc., and/or Cash Cole agree to make regular quarterly reports as to the financial status of Fairview Development, Inc., available to Nelse Mortensen, Cliff Mortensen and Frank Henderson in order that they may be apprised of the operation and security given for the indebtedness created herein.

3. Nelse Mortensen, Cliff Mortensen and Frank Henderson agree to pay to Everett Nowell the face of that certain promissory note held by Everett Nowell, in the sum of approximately $6800.00 in full settlement and satisfaction thereof and in dismissal of the pending lawsuit in connection with said obligation.

4. It is understood and agreed that there is pending litigation by Pilip & Butt Painting Contractors, Inc., and C. H. Keaton against plaintiffs and others and that Nelse Mortensen, Cliff Mortensen and

Frank Henderson shall be responsible and liable for any recovery that may be had as against them in said litigation and shall be entitled to retain the benefits of any judgment recovered in their favor, as a result of said litigation.

5. It is understood and agreed that there is approximately $8800.00 held by the National Bank of Commerce in Seattle, Washington, in connection with the landscape work, and it is agreed that said funds shall be paid to Nelse Mortensen, Cliff Mortensen and Frank Henderson.

6. Nelse Mortensen, Cliff Mortensen and Frank Henderson agree to hold Fairview Development, Inc., harmless from any claim by reason of legal services performed by Lycette, Diamond and Sylvester as attorneys for said corporation.

7. It is understood and agreed that all pending litigation between the plaintiffs and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, on the one hand, and Cash Cole, Everett Nowell and Bayview Realty, Inc., or any of them on the other hand, be and the same is fully settled and shall be dismissed with prejudice and without costs, including this present action.

8. Cliff Mortensen and Frank Henderson agree to resign as officers and directors of Fairview Development, Inc., on their successors being elected.

9. It is further understood and agreed that the Articles of Incorporation of Fairview Development, Inc., shall not be changed or modified, or the number

of shares of capital stock issued be increased or decreased, without the consent and approval of Nelse Mortensen, Cliff Mortensen and Frank Henderson, or unless the obligation in the sum of $89,000.00 provided for herein shall have been paid in full, it being the intention and understanding of the parties that as security for said indebtedness there shall remain in escrow all of the voting capital common stock of the corporation so that, in the event of any default, said Nelse Mortensen, Cliff Mortensen and Frank Henderson shall be entitled to all of the outstanding capital common stock of said Fairview Development, Inc., free of any and all liability whatsoever of any and all claims which Bayview Realty, Inc., or Everett Nowell or Cash Cole or the successors or assigns of either of them may have or claim to have against Fairview Development, Inc., and/or Cash Cole and/or W. A. Rushlight or A. G. Rushlight & Co., and any obligations of Fairview Development, Inc., other than ordinary normal debts or obligations incurred during the usual course of business of said corporation.

10. It is understood and agreed that this stipulation and settlement agreement shall be approved and confirmed by the court herein; and upon such confirmation, shall be binding and effective and the parties hereto, or any corporations controlled by them, will execute and deliver any such documents, instruments or conveyances as may be necessary or required to put into full force and effect the terms

and provisions of this agreement, including the release to Nelse Mortensen, Cliff Mortensen and Frank Henderson of funds presently being held by the National Bank of Commerce of Seattle, in escrow to cover liens filed against Fairview Manor at Fairbanks, Alaska.

11. It is hereby stipulated and agreed by and between all parties hereto that this agreement constitutes a full and complete satisfaction, compromise and release of any and all claims of whatsoever kind which the plaintiffs above named and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., may have against the defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, or which the said Cash Cole, Everett Nowell or Bayview Realty, Inc., may have against the plaintiffs above named and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, except as provided for herein.

NELSE MORTENSEN, CLIFF MORTENSEN and FRANK HENDERSON, and FAIRVIEW DEVELOPMENT, INC.,

/s/ JOSEF DIAMOND,

By /s/ WALTER SCZUDLO,

Their Attorneys.

CASH COLE, EVERETT NOWELL, and BAYVIEW REALTY, INC.,

/s/ CASH COLE,

/s/ EVERETT NOWELL,

/s/ NICHOLAS JAUREGUY,

/s/ JOHN HEDRICK,

Their Attorneys.

FAIRVIEW DEVELOPMENT, INC.,

By /s/ EVERETT NOWELL,
President.

By /s/ CASH COLE.

Approved:

/s/ CLIFF MORTENSEN,

/s/ FRANK HENDERSON,

/s/ EVERETT NOWELL.

BAYVIEW REALTY, INC.,

By /s/ EVERETT NOWELL.

NELSE MORTENSEN CO., INC.,

By /s/ CLIFF MORTENSEN.

[Endorsed]: Filed October 9, 1953.

[Title of District Court and Cause.]

FINAL DECREE AND ORDER

This matter coming on to be heard upon the motion of plaintiffs and upon written stipulation and agreement of all of the principal parties hereto, heretofore filed herein on October 9, 1953; and it appearing and the court finding that said parties have, by said stipulation and agreement, settled and compromised their respective claims and stipulated that said agreement constitutes a full and complete satisfaction, compromise and release of any and all claims of whatsoever kind, which the above-named plaintiffs and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., may have against the defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, or which said Cash Cole, Everett Nowell or Bayview Realty, Inc., may have against the plaintiffs above named, and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, except as provided in said stipulation and agreement; and that said parties have provided in said stipulation and agreement that upon confirmation and approval of said stipulation and settlement agreement it shall be binding and effective upon the parties thereto, and that said parties or any corporations controlled by them will execute and deliver any such documents, instruments or conveyances as may be necessary or required to put into full force and effect the terms and provisions of said agreement; and said stipulation and agreement contains other provisions and terms with

respect to the compromise of the various claims of the parties; and the court having heard statements of counsel, and being otherwise advised in the premises,

It is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That said written stipulation and settlement agreement executed by all of the parties hereto, except the two defendant banks, and filed herein on October 9, 1953, be and it is hereby approved and confirmed, and said stipulation and agreement, by this reference thereto, is incorporated in this final decree and order the same as if fully set out herein, and shall be and is now binding upon said parties and effective from the date of filing said agreement.

2. That the appointment of Robert E. Sheldon as receiver on October 8, 1953, for the property involved in the above-entitled cause be and it is hereby terminated as of the date hereof, and said Robert E. Sheldon be and he is hereby allowed for his services and fees the sum of $300.00, which the said Fairview Development, Inc., an Alaska corporation, be and it is hereby directed to pay to said Robert E. Sheldon, on or before ten days from the date hereof.

3. That the above-entitled cause be and it is hereby dismissed as of the date hereof.

Dated this tenth day of October, 1953.

/s/ HARRY E. PRATT,
United States District Judge.

[Endorsed]: Filed and entered October 13, 1953.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaska corporation, and Fairview Development, Inc., an Alaska corporation; Everett Nowell, individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.; Bayview Realty, Inc., an Alaska corporation, and for answer to the Complaint on file herein admit, deny and allege as follows:

I.

Defendants admit the allegations of Paragraph I, of plaintiffs' Complaint.

II.

Defendants deny each and every allegation contained in Paragraph II of plaintiffs' Complaint.

III.

Defendants admit that Cash Cole is an officer and director of Fairview Development, Inc., and Bayview Realty, Inc., and deny each and every other allegation contained in Paragraph III of plaintiffs' Complaint.

IV.

Defendants admit that Bayview Realty, Inc., is an Alaskan corporation; that Bayview is the owner of at least 50% of the capital common stock of the plaintiff, Fairview Development, Inc., comprising

450 shares of said capital stock which represents 50% of the voting stock of said corporation. Admit that Cash Cole and others control the defendant, Bayview Realty, Inc.; and deny that Everett Nowell has any right, title or interest in Bayview Realty, Inc.

V.

Defendants admit the allegations of Paragraph V of plaintiffs' Complaint.

VI.

Defendants admit the allegations of Paragraph VI of plaintiffs' Complaint.

VII.

Answering Paragraph VII of the Complaint on file herein, these answering defendants admit that the plaintiff, Fairview Development, Inc., was organized for the purpose, among other purposes, of constructing an apartment housing project at Fairbanks, Alaska, upon land leased from the City of Fairbanks, which said land was originally leased by Bayview Realty, Inc., from the said City of Fairbanks, Alaska, for a period of 75 years; that plaintiff, Fairview Development, Inc., did obtain a loan from the National Bank of Commerce, a national banking corporation, organized and existing under the laws of the United States, located in the City of Seattle, Washington; that the plaintiff, Fairview Development, Inc., did enter into a contract with Nelse Mortensen-Alaska, Inc., an Alaska corporation, for the construction of said housing

project, and that the said Nelse Mortensen-Alaska, Inc., did enter upon the construction of said housing project. These answering defendants deny each and every other allegation therein contained.

VIII.

Answering Paragraph VIII of the Complaint on file herein, these answering defendants admit that as apartment units were ready for occupancy that Cash Cole and Everett Nowell, acting pursuant to the terms of agreements previously made between plaintiffs and these answering defendants, and with the knowledge, consent and approval of the plaintiff, did manage and operate, and are managing and operating said units and housing project on behalf of Fairview Development, Inc. These answering defendants deny each and every other allegation therein contained.

IX.

Answering Paragraph IX of the Complaint on file herein, these answering defendants admit that they have conducted the management and operation of said units and housing project, pursuant to the agreements heretofore referred to, all with the knowledge, approval and consent of the plaintiffs. These answering defendants further admit that they have accounted to plaintiff and all other necessary parties in accordance with the agreements heretofore referred to and with the knowledge, consent and approval of plaintiffs, and in this regard have retained Herbert Lofquist, an accountant, to conduct the bookkeeping and accounting of said operation

and management, all pursuant to the agreements heretofore referred to and with the consent, approval and knowledge of plaintiffs; these answering defendants deny each and every other allegation therein contained.

X.

Defendants deny each and every allegation contained in Paragraph X of plaintiffs' Complaint.

XI.

Answering Paragraph XI of the Complaint on file herein, these defendants deny each and every allegation contained therein.

XII.

Defendants deny each and every allegation contained in Paragraph XII of plaintiffs' Complaint.

XIII.

Defendants admit that the First National Bank of Fairbanks, has on deposit funds of Fairview Development, Inc.; but deny each and every other allegation contained in Paragraph XIII of plaintiffs' Complaint.

XIV.

Answering Paragraph XIV of plaintiffs' Complaint on file herein, these defendants admit that the defendant, Bank of Fairbanks, has on deposit funds of Fairview Development, Inc.; but deny each and every other allegation contained therein.

XV.

Answering Paragraph XV of the Complaint on

file herein, these defendants admit that Everett Nowell called a special meeting of the Board of Directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; and these answering defendants further admit that Cliff Mortensen attended said special meeting. These answering defendants deny each and every other allegation contained therein.

Wherefore, these answering defendants, having fully answered the Complaint of the plaintiffs, pray for a decree of this Court as follows:

1. That the Complaint on file herein be dismissed with prejudice.

2. That these answering defendants have their costs and disbursements expended, including reasonable fees incurred in their behalf.

/s/ WARREN A. TAYLOR,
Of Attorneys for Defendants.

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he is the defendant in the above-entitled action; he has read the foregoing Amended Answer, knows the contents thereof, and that the same are true, as he verily believes.

/s/ CASH COLE.

Subscribed and Sworn to before me this 8th day of January, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires: 8/11/55.

Receipt of Copy acknowledged.

Lodged January 8, 1954.

[Title of District Court and Cause.]

MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

Come Now the above-named defendants, Fairview Development, Inc., and Bayview Realty, Inc., and Cash Cole, and for and on behalf of these defendants move this Honorable Court to vacate said Stipulation and Judgment rendered herein and relieve all of said defendants therefrom and to set aside, vacate, modify and relieve these defendants from the Judgment rendered in the above-entitled cause based upon said Stipulation for the following reasons, to wit:

(a) That Rule 60 of the Federal Rules of Civil Procedure gives this Honorable Court power and authority to set aside said Stipulation and Judg-

ment based thereon, and in support of the Motion states: That fraud was practiced by the prevailing parties, to wit: The plaintiffs and the defendant, Everett Nowell, against these particular movants.

(b) That this Motion is made within the time allowed by Rule 60 referred to above.

(c) That at the time the Stipulation was executed the said Cash Cole was extremely ill, suffering from results of a heart attack which had confined him to his room and bed and incapacitated him to properly think, and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said Stipulation and signed said Stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practiced by the prevailing parties.

(d) That the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson acted by and through these agents, including, but not limited to, the actions of Everett Nowell and W. A. Rushlight who pretended to be good friends of said Cash Cole, and Everett Nowell was an officer of the said corporation, and took advantage of the sickened condition of Cash Cole and caused him to enter into said Stipulation while sick in bed and unable to read and understand said Stipulation and contents of said Stipulation were falsely interpreted by the said W. A. Rushlight.

(e) That said Stipulation and Judgment ren-

dered therein is unconscionable, impossible of performance, confiscatory of these movants' interest in the properties involved therein, to wit: Fairview Manor, owned by Fairview Development, Inc., of which these movants are the owners thereof.

(f) That the said Everett Nowell aided the plaintiffs in this action in defrauding these movants and, as a reward for his entering into said conspiracy and for having practiced fraud and deceit on these movants, he did receive $1,000.00 in cash and a signed obligation executed by these movants, by which he was to receive $44,000.00 in addition to the amount he did receive, and that no part of said sum was due him and for which there was no consideration.

(g) That the Stipulation purports to be executed by Bayview Realty, Inc., and Fairview Development, Inc., which act was unauthorized by either the stockholders or by the Board of Directors, and was therefore the unauthorized act; not sufficient to bind said corporations.

(h) That W. A. Rushlight received for his part of the conspiracy a note executed by the Fairview Development, Inc., acting by and through these movants, for the payment of $25,000.00; that there was no consideration whatsoever for the execution and delivery of said note, and these movants received no consideration whatsoever for said note, and the same should be set aside.

(i) That Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as a result of said conspiracy, caused to be incorporated in said Stipulation a promise to pay by the Fairview Development, Inc., to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, the sum of $89,000.00, which promise to pay, made by Fairview Development, Inc., acting by and through these movants, was without consideration, was wholly void, and was procured by fraud and misrepresentation; this movant Cash Cole being overreached while sick and unable to transact any business. This movant, Cash Cole, informs the Court that he never, at any time, while physically or mentally able to transact business, ratified or confirmed said Stipulation and that the same should be set aside, vacated and held for naught, and that the Judgment based thereon should be vacated, set aside and held for naught, and these movants released from all liability thereunder.

This Motion is based upon all pleadings in the above-entitled cause, the Stipulation and Decree of Judgment rendered herein and the affidavits attached hereto.

Wherefore, movant prays for an Order of this Court setting aside and vacating the Stipulation and Judgment based upon said Stipulation; and that movant be allowed to file an amended answer and Cross-Complaint to plaintiffs' Complaint, and that the plaintiffs herein be restrained and enjoined from enforcing the provisions of said Judgment

pendente lite, and for such other and further relief as to the Court may seem just and equitable.

BELL & SANDERS and
WARREN A. TAYLOR,
Attorneys for Movant.

By /s/ WARREN A. TAYLOR,
Of Movant's Attorneys.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled action and makes this affidavit in support of the above-entitled Motion to set aside the stipulation and judgment based thereon.

That during the week ending October 4, 1953, the trial of the above-entitled cause was being heard before the District Judge of the above-entitled Court.

That on the 5th day of October, 1953, the affiant

suffered a severe heart attack which was of such severity that he was confined to his bed and required the services of a physician, Dr. Joseph M. Ribar, M.D., of the Fairbanks Medical and Surgical Clinic, who informed affiant that, under no circumstances, could affiant proceed as a witness in the said cause.

That affiant remained under the care of said physician for some time thereafter and received medication and treatment from said physician.

That affiant was administered certain drugs or medication that affected his eyes to such an extent that he was unable to see, and while in such condition, was prevailed upon to execute the stipulation filed in the above-entitled cause on the 9th day of October, 1953.

That while confined to his bed, and unable to read, the plaintiffs, acting in concert with one W. A. Rushlight, who was a house guest of affiant and who pretended to be a friend of affiant, induced affiant to sign said stipulation, said affiant not knowing the contents and import of said stipulation, and relied upon the statements of said A. G. Rushlight Company to the contents thereof which were false and fraudulent.

That said W. A. Rushlight, at the same time and place, and under the same conditions and circumstances hereinbefore set out, induced the affiant to execute a demand note to A. G. Rushlight Company for the sum of $25,000.00, there being no consideration for the execution of said demand note, and

affiant not knowing at the time that the said instrument was in fact a demand note.

That the said W. A. Rushlight did, at the same time and under the same conditions and circumstances hereinbefore set out, induce the affiant to execute an agreement whereby affiant agreed to pay to Everett Nowell the sum of $45,000.00. That there was no consideration for the execution of the same.

That the affiant did not ascertain the intent and import of the said stipulation, the demand note and the agreement with Everett Nowell until about one month after the execution of the instruments. That affiant had been administered drugs for his heart condition which enlarged his eyes so that he was unable to read for approximately one month after the execution thereof.

That the enforcement of the judgment based upon the stipulation between affiant and Nelse Mortensen, Cliff Mortensen and Frank Henderson, would be confiscatory of affiant's interest in Fairview Development, Inc., in that it is impossible to fulfill the terms of said stipulation and judgment.

That the monthly average income from Fairview Manor, the apartment project of Fairview Development, Inc., is between $31,000.00 and $33,000.00. That the payment on the first mortgage amounts to $21,-700.00 per month; coal for heat $3,500.00; electric power $1,660.00 and labor $5,000.00; incidentals, $1,000.00, making a total of $32,860.00. That after the payment of all expenses and fixed charges at the

end of November, 1953, there was a net balance of $130.00. That the income for December, 1953, will be approximately the same, but the expenses will be higher in heating and electrical energy. That at the date of the execution of this affidavit, affiant had not yet received the bill for coal for the month of December, 1953, but affiant believes that by reason of the colder weather, the same will be considerably higher than in previous months.

Affiant believes and therefore avers, that the said actions of Cliff Mortensen, Nelse Mortensen, Frank V. Henderson, W. A. Rushlight and Everett Nowell, conspired together to secure all the stock of affiant in said Fairview Development, Inc., as they well knew at the time of the execution of the documents and instruments hereinbefore mentioned that affiant could not make the payments provided in said stipulation, demand note, and agreement, and by the terms of said instruments, they would get all of affiant's stock in said corporation without the payment of any money to affiant. That all of said persons had access to the books of the corporation and well knew the income from rentals and the payments required by the terms of the mortgage, and the ordinary expenses of operating the apartment project, and deliberately took advantage of affiant's critical heart condition and inability to read to perpetrate the fraud upon him.

That the enforcement of the judgment entered herein would amount to a virtual forfeiture and con-

fiscation of affiant's interest in said corporation, without any consideration therefor.

That the said action was instituted by the plaintiffs without any authorization or resolution by the directors of Fairview Development, Inc., and was therefore unwarranted and illegal.

That at no time was affiant's wife or son, Tom Cole, informed of the matters discussed in the negotiations leading to the execution of the said documents, nor did his attorneys talk with him during said negotiations.

That affiant was in great pain and suffering during all the negotiations and was unable to comprehend the intent and import of said documents and instruments.

/s/ CASH COLE.

Subscribed and Sworn to before me this 7th day of January, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

United States of America,
Territory of Alaska—ss.

Tom Cole, being first duly sworn, upon his oath deposes and says:

That he is the son of Cash Cole, one of the defendants in the above-entitled action, and that he is also a director of Fairview Development, Inc.

That affiant has been connected with the operation of Fairview Manor, an apartment house owned by Fairview Development, Inc., and is thoroughly familiar with all matters connected therewith, including income from rentals, payment of fixed charges on the mortgage indebtedness and the expenses of operation of said apartment house.

That on the 5th day of October, 1953, while the trial of the above-entitled action was on trial before the Honorable Harry E. Pratt, the said Cash Cole suffered a severe heart attack, which necessitated the discontinuance of the trial, as the said Cash Cole was ordered by his physician, Joseph M. Ribar, M.D., not to take further part in said trial, and was also ordered to bed and to complete quiet. That the said doctor administered certain drugs to said Cash Cole to relax the arteries and take some of the strain

off his heart. That said drugs caused his eyes to dilate to such extent that he was unable to read print.

That the day following said heart attack the plaintiffs, Nelse Mortensen, Cliff Mortensen, Frank V. Henderson and Everett Nowell, acting in concert with one W. A. Rushlight, a house guest of said Cash Cole, and who pretended to be a close personal friend of Cash Cole, began negotiations with said Cash Cole regarding the proposed sale of stock in said corporation of the above-mentioned Nelse Mortensen, Cliff Mortensen, Frank Henderson and Everett Nowell to Cash Cole.

That the said W. A. Rushlight, acting for and on behalf of the said parties, plaintiff and Everett Nowell, and for himself, gained access to the bedroom of Cash Cole, contrary to the orders of said physician and induced said Cash Cole to execute the stipulation upon which the judgment in the above-entitled cause is based; and also induced said Cash Cole to enter into an agreement with Everett Nowell regarding the sale by said Nowell to Cash Cole of Nowell's stock in said corporation; and did induce said Cash Cole to execute a demand note in the sum of $25,000.00, payable to A. G. Rushlight and Company, the execution of which note had not been authorized by a resolution of the Board of Directors of Fairview Development, Inc., and was not based upon any consideration whatsoever; that the said W. A. Rushlight, at the time of the execution of said documents and instruments, well knew that said Cash Cole was in no condition, physically or mentally, to

execute the same, and that said Cash Cole did not comprehend the intent and import of said instruments.

That the said plaintiffs, Nelse Mortensen, Cliff Mortensen, Frank Henderson, and Everett Nowell and W. A. Rushlight well knew that the provisions of said stipulation, agreement and demand note were impossible of performance by said Cash Cole, as they were fully informed of the financial ability of Fairview Development, Inc., to perform said obligations of said instruments; that they were aware of the gross income of said apartment house and the amount of the payments on the mortgage on the same and the costs and expenses of the operations of the same.

That in December, 1953, the income from rentals was $35,307.09 for apartments and garages; that the mortgage payment was $21,700.00; fuel, approximately $4,000.00; electricity, approximately $2,000.00; labor, $5,136.67; redecorating apartments, approximately $1,000.00; incidentals, approximately $800.00; making total payments of $34,636.67, leaving a balance of $670.42.

That the balance for November, 1953, after the payment of expenses, was $130.00.

That Nelse Mortensen, Cliff Mortensen, Frank Henderson, Everett Nowell and W. A. Rushlight had access to the books of the corporation and did inspect said books and knew that said corporation was in no condition financially to meet the conditions and

terms of said stipulation, agreement and demand note hereinbefore mentioned.

That, due to the illness of Cash Cole, affiant has had the management of said Fairview Manor and is conversant with the financial condition of the owner thereof, Fairview Development, Inc., and that the statements herein contained are true and correct, as shown by the books of account of Fairview Manor.

/s/ TOM COLE.

Subscribed and Sworn to before me this 7th day of January, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires 8/11/55.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

United States of America,
Territory of Alaska—ss.

Joseph M. Ribar, M.D., being first duly sworn, upon his oath deposes and says:

That upon the 5th day of October, 1953, affiant was called to the home of Cash Cole, at Fairview Manor,

Fairbanks, Alaska, by the wife and son of Cash Cole, and upon arriving there found said Cash Cole suffering a great deal of pain from a severe heart attack.

That affiant examined said Cash Cole and found his heart condition serious and immediately advised him that under no circumstances could he continue with the trial of the case in which he was a defendant and witness.

Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.

That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Papaverine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart. One of said drugs has a tendency to dilate the eyes so that vision is so distorted that reading is impossible.

Affiant ordered Cash Cole to have no visitors until he had recovered some of his strength.

That affiant made several calls on Cash Cole during the following week and found that the patient was slowly recovering his strength and that he was regaining his vision, although he was still a very sick man.

It is the opinion of affiant that at no time within one week after the said heart attack was Cash Cole in a proper physical or mental condition to transact business matters.

/s/ JOSEPH M. RIBAR, M.D.

Subscribed and Sworn to before me this 7th day of January, 1954.

/s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

State of Washington,
County of King—ss.

The undersigned, Cliff Mortensen, being first duly sworn upon oath deposes and says as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Frank V.

Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissension and discord as to who in fact comprise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of said corporation property by one or more of the principal defendants in the above-entitled cause.

2. That at the time of the trial in the above-entitled cause and the execution of said stipulation filed herein October 9, 1953, and the entry of the final decree and order herein on October 10, 1953, the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson were stockholders of the plaintiff Fairview Development, Inc., owning collectively four hundred fifty (450) shares of its capital stock, which also represented 50% of the voting stock of said corporation. The plaintiff Cliff Mortensen was and is a director and officer of said plaintiff corporation, subject to change by the stipulation.

3. That at the time of the trial and execution of said stipulation and entry of said final decree and judgment the defendants Cash Cole and Everett Nowell were officers and directors of Fairview De-

velopment, Inc., the plaintiff corporation, and were officers, directors and stockholders of Bayview Realty, Inc., the defendant corporation. Said Bayview Realty, Inc., was the owner of 50% of the capital stock of the plaintiff Fairview Development, Inc., comprised of four hundred fifty (450) shares of said capital stock, which also represented 50% of the voting stock of said corporation. Said defendants Cash Cole and Everett Nowell controlled said defendant Bayview Realty, Inc.

4. That at the time of said trial and execution of said stipulation and entry of said final decree Cake, Jaureguy & Hardy and Nicholas Jaureguy of Portland, Oregon, appeared of record herein as attorneys for the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and did not withdraw as such attorneys until December 15, 1953; that John E. Hedrick of Seattle, Washington, appeared and continues to appear of record as attorney for Cash Cole, Everett Nowell and Bayview Realty, Inc., but the undersigned is informed and believes and upon such information and belief, states the fact to be that said Hedrick was primarily the attorney for the defendant Everett Nowell and that said Nicholas Jaureguy was primarily the attorney for said Cash Cole; that prior to said trial J. Hellenthal of Anchorage, Alaska, and Stephan J. Morrissey of Seattle, Washington, appeared of record herein for said defendants, but did not participate or appear at said trial or in connection with the negotiations resulting in said settlement and final decree; that Joe Diamond and Earle Zinn of Seattle, Washington, and Walter

Sczudlo of Collins and Clasby appeared as attorneys for the plaintiffs.

5. That at the time of the said trial, stipulation and final decree the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by Cliff Mortensen, Nelse Mortensen and Frank Henderson:

a. A. G. Rushlight & Co., a corporation, vs. Nelse Mortensen-Alaska, Inc., a corporation; Fairview Development, Inc., et al., Case No. 7163, in the District Court of the District of Alaska, Fourth Division, filed to foreclose a mechanic's lien claimed by said A. G. Rushlight & Co. against Fairview Manor in the total sum of $344,973.30, together with interest thereon at the rate of 6% per annum from December 16, 1951, plus attorneys' fees of $35,000.00 and costs and disbursements; and in which proceeding by cross-complaint Pilip & Butt Painting Contractors, Inc., sought to foreclose their claim of mechanic's lien against Fairview Manor in the sum of $77,-681.62, together with interest thereon from January 1, 1952, plus attorneys' fees in the sum of $5,000.00 and costs and expenses; and in which proceeding C. H. Keaton, d/b/a Keaton Paint Company, sought to foreclose his claim of lien against Fairview Manor in the sum of $17,339.44, together with interest thereon from November 20, 1951, and to recover attorneys' fees and costs and expenses.

b. Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight & Co., a corporation, Case

No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division.

c. Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, doing business as Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, et al., Case No. 442980, in the Superior Court of the State of Washington for King County.

d. Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., et al., Case No. 3532, in the District Court of the United States for the Western District of Washington, northern division.

For further data concerning these suits reference is made hereby to the affidavit of Frank V. Henderson filed in the above-entitled cause on August 14, 1953, para. 9 thereof.

6. The trial in the above-entitled cause commenced on or about October 5, 1953, and continued that entire day including the taking of the testimony of the defendant Cash Cole on direct examination as an adverse witness for the plaintiffs. That the undersigned is informed and believes and upon such information and belief states the fact to be that that evening said Cash Cole suffered a heart attack, which purportedly made him physically unable temporarily to continue with his testimony as a witness. The following day, October 6, the plaintiffs were prepared to continue with the trial providing the attorneys for defendants and said Cash Cole agreed to complete the trial without requesting its continu-

ance at the conclusion of the plaintiffs' case for the purpose of securing the testimony of said Cash Cole, but said attorney for Cash Cole, Nicholas Jaureguy, refused to agree to further proceedings in the trial on such condition and said trial was thereupon continued from day to day except for the taking of the testimony of Arnoldine Scott, for the purpose of determining the time when Cash Cole could again attend the proceedings.

7. Immediately upon the first continuance on October 6, 1953, the attorneys for Cash Cole and other defendants suggested that negotiations be opened for settlement of the various claims and counter-claims of the plaintiffs, and the defendants, as well as those of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. Such negotiations were commenced in the jury room adjoining the courtroom on the morning of October 6. There were present at that time said Nicholas Jaureguy, said John E. Hedrick, Tom Cole, the son of Cash Cole, said Everett Nowell, Dick Rushlight, Cliff Mortensen, Frank Henderson, Joe Diamond, Earle Zinn, Walter Sczudlo and one or two other persons, who thereafter from time to time and in various places participated in said negotiations until they were concluded. The final offer of settlement made by said Nelse Mortensen, Cliff Mortensen and Frank Henderson, for the purpose of compromising the conflicting claims of the various parties involved and to terminate the deadlock among the stockholders and members of the Board of Directors of Fair-

view Development, Inc., and all dissension and discord, was reciprocal in that said plaintiffs would either purchase the shares of stock of Fairview Development, Inc., owned by the defendants Cash Cole, Everett Nowell, and Bayview Realty, Inc., aggregating 450 shares, for $1,000.00 and would secure payment of the sum of $89,000.00 by Fairview Development, Inc., to said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., in consideration of the release and discharge of all claims against them and Fairview Development, Inc., by said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., by pledging all the stock of said Fairview Development, Inc., so purchased, as well as then owned by them, and to assume and settle the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton, or to sell for the sum of $1,000.00 to said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., the 450 shares of stock of Fairview Development, Inc., owned by said Nelse Mortensen, Cliff Mortensen and Frank Henderson and to release and discharge said Cash Cole, Everett Nowell, Bayview Realty, Inc., and Fairview Development, Inc., from all claims and demands whatsoever made by them upon payment by Fairview Development, Inc., of said sum of $89,000.00, which payment would be secured by a pledge of all of the stock of said corporation then owned by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., and to be acquired by such purchase from said Nelse Mortensen, Cliff Mor-

tensen and Frank Henderson, and to assume the settlement and payment of the claims of said A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton.

Cash Cole, during these negotiations, refused to sell his shares of stock in the Fairview Development, Inc., and to terminate his interest therein, but insisted on buying out the interests of Nelse Mortensen, Cliff Mortensen and Frank Henderson and settling all their claims against him, the other defendants and Fairview Development, Inc. Said Mortensens and Henderson were willing to sell their interest and settle such claims, providing that a settlement was likewise consummated with A. G. Rushlight & Co., of its claim of mechanic's lien in Case No. 7163.

8. No settlement had been reached by October 8, 1953. On that day the trial was continued generally due to the absence of Cash Cole and refusal of the defendants to stipulate that a continuance would not be requested by them at the conclusion of the plaintiffs' case due to such absence. At the same time an order was entered in this cause appointing Robert E. Sheldon as receiver for the property involved in this cause and all the assets and corporate records of the plaintiff corporation and its business together with all improvements located thereon and all personal property therein, and the rents, issues and proceeds thereof. Said receiver immediately served notice of taking possession.

9. During the above-mentioned negotiations leading to a settlement several compromise plans were from time to time worked out by the several attorneys representing the defendants and those representing the plaintiffs, together with Dick Rushlight, acting on behalf of A. G. Rushlight & Co., and were reciprocal in nature in that Nelse Mortensen, Cliff Mortensen and Frank V. Henderson were willing "to buy or sell" and to settle all conflicting claims, which plans were submitted through one or more of the attorneys acting for Cash Cole and the other defendants to Cash Cole for consideration, and were rejected by him prior to the final settlement agreement contained in the stipulation filed in this cause on October 9, 1953, and approved by this court on October 10, 1953. Apparently said Cash Cole elected on or about October 9, 1953, following the appointment of the receiver above mentioned, the alternate offer of purchasing the interests of said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and settling their claims against him and Fairview Development, Inc., upon the terms and conditions contained in the stipulation filed herein October 9, 1953. His attorney, Nicholas Jauregui, refused to execute said stipulation on his behalf until he had submitted said stipulation to Cash Cole for his personal consideration and secured his signature thereto, which stipulation was executed by said Cash Cole individually and on behalf of Fairview Development, Inc. The undersigned is informed and believes and upon such information and belief states the fact to be that prior to the execution

of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor with any one or more of the following persons and in their presence: Said Nicholas Jaureguy, his attorney; Tom Cole, his son; Mrs. Cash Cole, his wife, and Dick Rushlight. Said stipulation was only executed by him after such discussion for the purpose of securing the control of the plaintiff corporation and the discharge of the receiver above mentioned and with full knowledge of all of the terms and conditions contained in said stipulation and the fact that the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton filed against Fairview Development, Inc., and others were being likewise assumed by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and settled as hereinafter mentioned.

10. Upon consummation of the settlement agreement contained in the stipulation filed in the above cause and as a part thereof, a settlement agreement was made with A. G. Rushlight & Co., of its claim against Fairview Development, Inc., et al., for a lien sought to be foreclosed in case No. 7163. Said stipulation provided for payment of $125,000.00 to said A. G. Rushlight & Co., by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and was filed in said Case No. 7163 on October 9, 1953.

11. The final decree of this court approving the stipulation filed herein on October 9, 1953, was entered herein on October 10, 1953, and provided for the discharge of the receiver herein, and further

provided that the said stipulation and agreement contained therein was incorporated in said final decree the same as if fully set out therein and would be binding and was then binding upon the parties thereto and effective from the date of the filing thereof.

12. Said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have complied with and fully performed all of the terms, conditions and provisions of said settlement agreement contained in said stipulation, including payment of $125,000.00 to A. G. Rushlight & Co., in settlement of its claim in Case No. 7163 pursuant to the stipulation filed therein; dismissal on November 20, 1953, of the amended complaint filed in said case by said A. G. Rushlight & Co.; settlement of the claim of Pilip & Butt Painting Contractors, Inc., sought to be foreclosed in the same case and payment of the amount due said claimant; making provision for defending against the claim of C. H. Keaton in the same suit without any cost to Fairview Development, Inc., and securing dismissal of the other suits pending in the State of Washington described in paragraphs 5 b, c, and d hereinabove; and payment to Everett Nowell of the amount due under a certain promissory note held by him in approximately the sum of $6,800.00 as provided in paragraph 3 of said stipulation.

13. At the time of the execution of said stipulation, said Fairview Development, Inc., did not pay $6,800.00 as provided in paragraph 2 thereof or any

part thereof nor have any payments been made as required. Under the terms of said paragraph Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, Nelse Mortensen-Alaska, Inc., and Nelse Mortensen Co., Inc., released and discharged all of the defendants in the above case and Fairview Development, Inc., from any and all claims or demands whatsoever in consideration of the agreement of Fairview Development, Inc., to pay to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson the sum of $89,000.00 without interest as provided in said stipulation. $37,800.00 of said payment represented funds repaid to Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and theretofore advanced to Fairview Development, Inc., as so-called "front money." The balance of $51,200.00 represented consideration for the release of any and all claims against Cash Cole, Everett Nowell, Fairview Development, Inc., and Bayview Realty, Inc., and in settlement of all disputes between the parties. Said sum was payable as follows: $6,800.00 at the time of the execution of said stipulation, $3,200.00 on or before December 31, 1953, and $5,000.00 payable April 15, 1954, and quarter annually thereafter each year until the said total sum of $89,000.00 had been paid. Said obligation in the sum of $89,000.00 was specifically secured by said settlement agreement by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., pledging all of the capital stock of Fairview Development, Inc., (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or

more of them and thereafter to be acquired under the terms of said settlement agreement. Said shares of stock were to be placed in escrow. Demand has heretofore been made on Cash Cole, Everett Nowell and/or Bayview Realty, Inc., to deliver said stock in escrow and they have refused to comply with said demand and with the terms and conditions of said settlement agreement and are in default. Pursuant to the further terms and provisions of said agreement in the event of the non-payment of any installment hereinabove mentioned, said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have declared the full balance of said obligation due and owing and have required that said capital stock aggregating 900 shares be delivered to them as their property, and that the same be transferred to them in full, satisfaction of the said sum of $89,000.00 or the balance thereof now due. Said defendants Cash Cole, Everett Nowell, and/or Bayview Realty, Inc., have refused and failed to deliver said shares of stock to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson or any one or more of them and continue to refuse to make such delivery, but have accepted and enjoy all benefits derived from the performance of the terms and conditions of said settlement agreement made by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson.

14. There is no provision in said settlement agreement contained in said stipulation that the said sum of $89,000.00 or any portion thereof would be paid solely out of the income derived by Fairview Development, Inc., but it was specifically pro-

vided that the defendants Cash Cole, Everett Nowell and/or Bayview Realty, Inc., would secure performance of said undertaking by pledge of all of the stock of said Fairview Development, Inc., as hereinabove stated and more fully set out in said stipulation. The plaintiffs were only partially familiar with the income derived from Fairview Manor and the costs and expenses incurred by the latter. Their access to the corporate books was limited only to a partial examination commencing about the time of the trial for the purpose of determining the nature of various discrepancies appearing in the books, unauthorized expenditures by Cash Cole for salaries and expenses for himself personally and members of his family and said defendant Everett Nowell. Such examination of the books was incomplete and inadequate and had no relation to the settlement agreement covered by said stipulation.

15. There is nothing in said stipulation or in the final decree approving the same, which is unconscionable, impossible of performance or confiscatory of the interests of Cash Cole, Everett Nowell and/or Bayview Realty, Inc.; that said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson had been willing prior to the consummation of said settlement agreement to undertake the same terms and conditions, which were undertaken by Cash Cole and his associates pursuant to said stipulation. The loss of the shares of stock in the Fairview Development, Inc., now suffered by Cash Cole and Bayview Realty, Inc., has resulted from the default in the performance of the terms and conditions of said

settlement agreement by said Cash Cole and Fairview Development, Inc., under his direction.

16. There was no conspiracy or effort to overreach said defendant Cash Cole or Bayview Realty, Inc. The negotiations for settlement above mentioned were conducted by Nicholas Jaureguy, attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, attorney for Everett Nowell, Dick Rushlight, acting as representative for A. G. Rushlight & Co., Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and Fairview Development, Inc., and other plaintiffs. These several attorneys represented independent of each other the respective conflicting claims of the parties to this cause. Everett Nowell and said Cliff Mortensen and Frank V. Henderson personally participated in said negotiations, as well as said Cash Cole, to whom various compromise plans were from time to time submitted through his attorney as hereinabove mentioned. The settlement agreement contained in the stipulation was by its terms specifically subject to approval by the court (see para. 10 thereof), and was approved by the court in its final decree entered herein on October 10, 1953, and by the terms of said final decree became effective and binding on all the parties thereto and settled all of their respective claims, demands and differences.

17. There was no fraud or conspiracy practiced or attempted by the plaintiffs or any of them or the defendant Everett Nowell or Dick Rushlight, or any

one or more of the parties to this cause, but careful consideration was given by Nicholas Jaureguy, attorney for Cash Cole, and ultimately Cash Cole himself for the purpose of purchasing the interests of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson so as to gain control of Fairview Development, Inc., and the Fairview Manor, to settle the various claims of said parties against each other, to secure the discharge of Robert E. Sheldon, receiver then recently appointed in the above case as above mentioned, and to secure dismissal of other litigation pending between these parties and avoid further trial in this case, and to secure payment of the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. The interests of these various groups in this case were adverse to each other and each group personally or through its attorneys conducted the negotiations independently for its own benefit and without any misrepresentation with respect to any proposed compromise plan, or opportunity for fraud, or to overreach Cash Cole or any other of the parties involved for its own advantage, since all phases of said negotiation and proposed settlement were known to each of said groups, and especially to said Cash Cole, his son, his wife, and his attorney, who had full possession of all of the facts and all of the corporate books of Fairview Development, Inc., during this entire period.

18. Said Cash Cole as hereinabove indicated did understand the nature of the settlement agreement

and the stipulation filed herein embodying the terms and conditions thereof and was mentally capable of comprehending said terms and conditions. He executed it after refusing to sell his interests upon the same terms and conditions to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson for the purpose of complete ownership of the common stock of Fairview Development, Inc., and control of said corporation and Fairview Manor; to secure discharge of the receiver then appointed by the court; to avoid the trial in this case; to settle other pending litigation; and to secure payment of the claim of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. There was adequate consideration for such settlement agreement and ample deliberation on his part, as well as with Dick Rushlight, Nicholas Jaureguy, his attorney, his wife and his son. There was no mistake, inadvertence, surprise, excusable neglect, or fraud practiced by the plaintiffs. Said Everett Nowell, W. A. Rushlight, or either of them, or any other person or persons, except their duly authorized attorneys hereinabove mentioned, did not act for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson or other plaintiffs in this case or any of them in the settlement negotiations, or conspire in any manner or take advantage of the purported sickened condition of Cash Cole, but in fact said W. A. Rushlight and Everett Nowell had separate interests of their own to protect, which were those adverse to those of Nelse Mortensen, Cliff Mortensen

and Frank V. Henderson, and which were involved in the settlement discussions and negotiations.

19. The undersigned is not familiar with the nature of the obligation in the sum of $44,000.00 purportedly executed by Fairview Development, Inc., Bayview Realty, Inc., and Cash Cole to Everett Nowell at or about the time of the stipulation involved in this cause or subsequent thereto and payment of the sum of $1,000.00 cash. Any such obligation and payment constituted separate negotiations between Everett Nowell and said Cash Cole and others to which Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson were not parties and did not participate in such negotiations and which obligation and payment were not embodied in the settlement agreement evidenced by the stipulation filed herein and represent apparently settlement of conflicting interests between said Everett Nowell and Cash Cole. The undersigned has been informed and believes and upon such information and belief states the fact to be that said obligation represented an agreement by Cash Cole to purchase all the interest of said Everett Nowell in the Fairview Development, Inc., and settlement of all his claims, which obligation was executed by Cash Cole in order to secure the consent and approval of said Nowell to the stipulation filed in this cause and complete ownership and control of Fairview Development, Inc., and Fairview Manor. Said plaintiffs were not a party in any way to the negotiations leading up to said obligation and its consummation and had no

agreement with respect thereto between themselves and said Nowell.

20. That the said stipulation filed in this cause containing said agreement was executed by said Bayview Realty, Inc., and Fairview Development, Inc., through its authorized officers and was further executed by all the then stockholders of said corporation or the overwhelming majority of each of said corporations and consequently such execution constituted approval, confirmation and ratification by said respective stockholders.

21. That the undersigned is not familiar with any note or agreement received by W. A. Rushlight in the sum of $25,000.00, and if there was any such note or agreement, it represented independent negotiations between said W. A. Rushlight and Cash Cole on or about the time of the execution of the settlement involved in this cause or subsequent thereto, to which negotiations and agreement said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and other plaintiffs were not a party, did not participate in, and had not authorized and in which they were not interested. Such agreement or note was apparently delivered to settle the respective interests and claims existing between said Cash Cole and W. A. Rushlight.

22. Said Cash Cole not only participated in the negotiations hereinabove mentioned in the manner hereinabove indicated, terminating in said settlement agreement as evidenced by the stipulation filed

in this cause on October 9, 1953, but also ratified and confirmed said settlement agreement subsequent to his purported illness by accepting the benefits of the performance of the terms and conditions of said settlement agreement by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson resulting in the dismissal of the various litigation hereinabove mentioned, payment by them of $125,000.00 to A. G. Rushlight & Co., in Case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Painting Contractors, Inc., and release and settlement of other conflicting claims. Said Cash Cole and Bayview Realty, Inc., or others in their behalf, have not offered to make restitution and to place the parties in the same position as they were at the time of the filing of said stipulation on October 9, 1953, in connection with their motion to set aside and vacate said stipulation and the judgment based thereon. They are estopped now from questioning said stipulation and settlement agreement embodied therein and from the final decree based thereon to the prejudice and damage of the plaintiffs and particularly said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson who in good faith entered into said stipulation and settlement agreement and performed the terms and conditions thereof.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ CLIFF MORTENSEN.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal]: /s/ MARIAN M. PARKS,
Notary Public for the County of King, State of Washington.

My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

State of Washington,
County of King—ss.

The undersigned, Frank V. Henderson, being first duly sworn upon oath deposes and says as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That the undersigned is one of the plaintiffs in the above-entitled cause and familiar with the proceedings taken therein and the negotiations pre-

ceding and culminating in the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, and approved by the final decree entered herein on October 10, 1953; that the undersigned was present at the time of said negotiations and participated therein.

2. That the undersigned has examined and is familiar with the affidavit executed by Cliff Mortensen in opposition to said motion to set aside and vacate said stipulation and judgment based thereon, filed in this cause and by this reference does hereby adopt said affidavit and make the contents thereof a part hereof as if fully set out herein.

3. That there was considerable controversy and unfriendly feeling between the undersigned and Dick Rushlight, representing A. G. Rushlight & Co., during said negotiations because said Rushlight refused to enter into any settlement of the claims of said A. G. Rushlight & Co., in Case No. 7163 unless likewise a settlement was made with Cash Cole in the above-entitled cause on terms and conditions acceptable to said Cash Cole; and that the final terms and conditions contained in said stipulation were reached after several prior compromise plans had been tentatively accepted by other parties to said negotiations, but each rejected by said Cash Cole through his attorney, Nicholas Jaureguy, after submission to him for consideration.

4. That said defendant Cash Cole, acting individually or as an officer, director and stockholder

of Bayview Realty, Inc., or both on his own behalf, or on behalf of said Bayview Realty, Inc., has been collecting the rents issues and proceeds of the Fairview Manor since the discharge of the receiver, Robert E. Sheldon, in the above-entitled cause on October 10, 1953, and has been in possession of said Fairview Manor and operating it, and doing one or more of the following acts and taking one or more of the following actions either himself or through his agents or representatives:

a. Controlling said apartment housing project and disbursing the rentals therefrom at will and without accounting to the plaintiffs or any one or more of them.

b. Paying to himself and others from rentals and funds belonging to the plaintiff corporation, Fairview Development, Inc., salaries and expenses, which had not been approved or authorized by said plaintiff corporation or the Board of Directors. These salaries and withdrawals have been exorbitant and beyond all proportion to services rendered.

c. He has permitted members of his family and others to occupy apartments in said project rent free without authority or approval of the plaintiff corporation or its Board of Directors.

d. He has antagonized the tenants and been arbitrary in his conduct toward them, resulting in many unnecessary vacancies in said apartment project and loss of income to the plaintiff corporation.

e. He has failed and refused to account for and pay to the plaintiff corporation the funds received by him from rentals and other income from said project; and has failed to account for said funds belonging to the plaintiff corporation to its Board of Directors or to obtain the approval of said Board of Directors for withdrawal of such funds for his own benefit or for the payment of salaries and expenses for himself and others without authority.

f. He has failed to secure authority and approval of the Board of Directors of said plaintiff corporation as to any salaries taken by him or the free rental of certain apartments, or the approval of extraordinary disbursements or expenses or costs, or determination of corporate policies or exercise of corporate powers.

g. He has taken to himself solely the operation, management and direction of the properties of the plaintiff corporation and the determination of corporate policies and the exercise of corporate powers.

h. He has done other acts and taken other actions without authority of the Board of Directors of said plaintiff corporation which are detrimental to said corporation, its stockholders in general and plaintiffs in particular.

5. That the acts and actions of said Cash Cole and his agents and representatives hereinabove mentioned not only before the settlement agreement evidenced by the stipulation filed in this cause, but likewise since said settlement and final decree herein

have operated to the detriment, loss and damage of the plaintiff corporation, Fairview Development, Inc., and the individual plaintiffs, first by reason of their interest in the security provided under said settlement agreement, paragraph 2 of the stipulation, and secondly, as owners of the majority of shares of stock in the plaintiff corporation by reason of the default in the performance of the settlement agreement as more fully disclosed in said affidavit executed by Cliff Mortensen; that such acts and actions are contrary to the general laws of the Territory of Alaska, or the articles of incorporation or the bylaws of said plaintiff corporation.

6. That the property and assets of plaintiff corporation are presently being dissipated and lost by reason of said unlawful and unauthorized acts and actions of said Cash Cole, his agents and representatives; that irreparable injury and damage will be done to the plaintiff, Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen, and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection.

7. Under the general laws of the Territory of Alaska, the plaintiffs, jointly and severally, are entitled to the appointment of a receiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof until disposal of said motion to set aside and vacate the stipulation and judgment based

thereon filed by said Cash Cole and Bayview Realty, Inc., and until the shares of stock in said corporation have been secured by said individual plaintiffs by reason of default in the performance of the terms and conditions of said settlement agreement contained in said stipulation, for the purpose of protecting and preserving said property and the interests of said corporation and the interests of all of the stockholders of said corporation.

8. That for further facts concerning the controversy involved in this cause and the unlawful conduct and actions taken by said Cash Cole and other defendants, reference is hereby made to the affidavit of Cliff Mortensen filed herein on June 25, 1953, the separate affidavits of Cliff Mortensen, subscribed August 10, 1953, and August 11, 1953, filed herein on August 14, 1953, the affidavit of the undersigned dated August 12, 1953, filed herein August 14, 1953, and the separate affidavits of J. E. Swanson, Jr., and J. F. Campbell filed herein on August 14, 1953, as well as the testimony taken in this cause of said Cash Cole and Arnoldine Scott at the time of the trial.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MARIAN M. PARKS,
Notary Public for the County of King, State of Washington.

My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

State of Washington,
County of King—ss.

The undersigned, Joe Diamond and Earle Zinn, being first duly sworn upon oath depose and say as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That they appeared with Walter Sczudlo of Collins and Clasby, Fairbanks, Alaska, as attorneys for the plaintiffs in the above-entitled cause at the

time of the trial and prior thereto and the negotiations terminating in the settlement agreement evidenced by the stipulation filed herein October 9, 1953, on the basis of which the final decree was entered herein on October 10, 1953; that they are familiar with all of the proceedings and steps taken in this cause and with all phases of said settlement negotiations; that they are now attorneys with said Walter Sczudlo of record for said plaintiffs in this cause.

2. That they have examined the affidavit executed by Cliff Mortensen and filed herein in opposition to said motion to set aside said stipulation and vacate the final decree based thereon and are familiar with the contents thereof and do hereby adopt the same and by this reference make said contents a part of this affidavit the same as if fully set out herein.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ JOSEF DIAMOND,

/s/ EARLE ZINN.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MARIAN M. PARKS,
Notary Public for County of King, State of Washington.
My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Joseph M. Ribar, M.D., being first duly sworn, on oath deposes and says:

1. That this affidavit is executed to supplement the affidavit heretofore filed in the above-entitled cause and executed by the undersigned.

2. That said original affidavit refers to a heart attack suffered by Cash Cole on October 5, 1953, and the steps taken by the undersigned as a doctor to attend said Cash Cole.

3. That it is the opinion of the affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters, but I am unable to state as to whether or not he was mentally competent to transact any business matters after the expiration of seventy-two (72) hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency.

4. That the drugs mentioned in said original affidavit of the undersigned have a tendency to dilate the eyes so that vision is so distorted that reading is impossible, but such effect is limited to approximately seventy-two (72) hours after the

administration of such drugs and would not continue for approximately one month.

Dated at Fairbanks, Alaska, this 10th day of February, 1954.

/s/ JOSEPH M. RIBAR, M.D.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for the
Territory of Alaska.

My commission expires: June 10, 1954.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION OF MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

State of Washington,
County of King—ss.

Everett Nowell, being first duly sworn on his oath deposes and says:

That he is one of the defendants in the above-entitled action and makes this affidavit in opposition to Motion to Set Aside and Vacate the Stipulation

and Judgment Based Thereon, the supporting affidavits thereto, and Amended Answer filed herein, all made and executed by or on behalf of Cash Cole, another defendant herein.

The above-designated complaint was filed and served by the above-named plaintiffs against the above-named defendants for the reason that the plaintiffs were dissatisfied with the management of Fairview Development, Inc., and Alaska Corporation and requested that the defendant, Cash Cole and your affiant, Everett Nowell, be removed and disassociated from all management or operation of the housing project of Fairview Development, Inc.

The defendants, Cash Cole, individually and as an Officer and Director of Bayview Realty, Inc., another defendant, and Everett Nowell, individually and as an officer and Director of Bayview Realty, Inc., and both as Directors of Fairview Development, Inc., were represented by Cake, Jaureguy, and Hardy, Attorneys at Law, of Portland, Oregon, and Morrissey, Hedrick, Roberts & Dunham, Attorneys at Law, of Seattle, Washington, acting together. The defendants through their counsel prepared and filed an answer to the complaint. Thereafter certain motions were drafted and filed and were argued before this Court, following which this matter came on formally for hearing and trial on or about the 5th day of October, 1953. Attorney, Josef Diamond, of Lycette, Diamond & Sylvester, Attorneys at Law of Seattle, Washington, made an

opening statement to the Court and called certain witnesses who gave testimony in this trial. The transcript of the opening statement and the testimony is part of the record on file and will not be repeated by your affiant. However, the testimony showed certain activities by Cash Cole in relation to his management of Fairview Development, Inc., which was not for the benefit of Fairview Development, Inc., and which your affiant had no knowledge prior thereto.

On or about October 5, following the first day of the trial of this matter, your affiant was informed that Cash Cole had suffered an alleged heart attack. From the time that Cash Cole left the Courtroom on October 5, 1953, to the present date, your affiant has not seen, talked to, communicated with, or in any manner had any contact whatsoever with Cash Cole.

That thereafter, because of the testimony given at the trial in this matter, and because it was alleged that Cash Cole was ill and incapable of any work, this honorable Court appointed a receiver for Fairview Development, Inc. The receiver was ordered to take over all of the assets of Fairview Development, Inc., and manage them under the advice and jurisdiction of this honorable Court.

That thereafter, during the next several days negotiations took place with the idea that the various parties could settle their differences and dispose of their interests in Fairview Development, Inc., in a mutually satisfactory manner.

Originally and for a long time prior to this trial, your affiant and Cash Cole were both represented by Morrissey, Hedrick, Roberts & Dunham, Attorneys at Law, of Seattle, Washington, that after this case was started by the plaintiffs herein, Cash Cole declared that he wanted other and more legal counsel to represent him, at that time the law firm of Cake, Jaureguy and Hardy, of Portland, Oregon, was retained. Up to the time of negotiations the two law firms both acting together and in concert represented both Cash Cole and your affiant. But, when these negotiations started, at that time, John Hedrick worked primarily for the interest of Everett Nowell, your affiant, and Nicholas Jaureguy worked primarily for the interests of Cash Cole. Mr. W. A. Rushlight, a resident of Portland, Oregon, and a house guest of Cash Cole, also took part in the negotiations on behalf of Cash Cole.

The plaintiffs were represented by Josef Diamond, and Earl Zinn, of Lycette, Diamond and Sylvester, Attorneys at Law, of Seattle, Washington, and Walter Szcudlo, of the law firm of Collins and Clasby, of Fairbanks, Alaska. The plaintiffs present were Cliff Mortensen and Frank V. Henderson. During this period of time your affiant, John E. Hedrick, Nicholas Jaureguy, W. A. Rushlight, Joseph Diamond, Earl Zinn, Walter Szcudlo, Cliff Mortensen, and Frank V. Henderson carried on many, many hours of negotiations and discussion. Thereafter the stipulation on file in this matter was drawn and signed by all parties carrying on the negotiations. The original and copies were given

to either Nicholas Jaureguy or W. A. Rushlight for the purpose of having it presented to Cash Cole. Thereafter the original and copies were returned with Cash Cole's signature thereon. Your affiant has no knowledge as to what happened in obtaining the signatures of Cash Cole.

During the same period of time your affiant, John Hedrick, W. A. Rushlight, Nicholas Jaureguy carried on negotiations to sell to Cash Cole, affiant's interests and claims in Fairview Development, Inc. As a result of these negotiations certain contracts and releases were drafted and signed by the interested parties. The original and copies of these contracts and releases were given to Nicholas Jaureguy to obtain the signature of Cash Cole. They were returned to your affiant with Cash Cole's signature thereon. How Cash Cole's signature was obtained your affiant has no knowledge. Cash Cole agreed to purchase your affiant's interests and claims on the same basis as provided for in the stipulation.

Your affiant has given no permission to Cash Cole, or the attorneys now representing him to draft and/or file an Amended Answer in this matter on behalf of your affiant. Your affiant's attorneys have not been discharged or paid by Cash Cole, although these attorneys have no desire to further represent Cash Cole.

That since said negotiations and stipulation having been entered into this matter and since the execution of the contract and releases herein referred to, your affiant has carried out the requirements and

conditions of those contracts and the stipulation; the chief one being that your affiant deliver all of the capital stock owned by him, of Bayview Realty, Inc., to Cash Cole. Cash Cole since that time has turned over the minutes of West Juneau, Inc., and Gastineau Utility, Inc., pursuant to the contracts. Cash Cole has not released his stock in the two last mentioned corporations. That since that time, Cash Cole has recognized the validity of everything done by the fact that he has caused his son, Tom Cole, to become a Director of Fairview Development, Inc., and has placed someone else on the Board of Directors of Fairview Development, Inc., now unknown to your affiant. Cash Cole has taken over the assets of Bayview Realty, Inc., and exercised them to his own design and purpose, your affiant, pursuant to the stipulation has dismissed a cause of action against the plaintiffs which prayed for a recovery in excess of six hundred ninety thousand ($690,000) dollars. Therefore, Cash Cole desires to have all the benefits of the arrangements freely entered into by him, but to use this Court to escape the liabilities and covenants agreed by him.

Further Your Affiant Sayeth Not!

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 11th day of February, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause.]

MOTION FOR APPOINTMENT OF RECEIVER

Now Come the plaintiffs, in the above-entitled cause, jointly and severally, Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, and move as follows:

1. That the court appoint a disinterested party as receiver, or reinstate Robert E. Sheldon, formerly acting as receiver in this case, to take over the management and operation of Fairview Manor Apartments at Fairbanks, Alaska, involved in this cause, until the pending motion of said Cash Cole and Bayview Realty, Inc., to set aside the stipulation filed herein on October 9, 1953, and the final decree based thereon entered October 10, 1953, have been heard and disposed, and said defendants have complied with the terms and provisions of said final decree and the said stipulation, to collect all income therefrom and make all disbursements for current operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

2. That said receiver upon qualifying be authorized and instructed to take immediate possession of Fairview Manor Apartments and all other property of the plaintiff corporation, Fairview Development,

Inc.; to collect and preserve the rents, issues and profits thereof; and that he have the general powers of receivers in such cases as well as such special powers as this court may grant to him from time to time; and that any party or parties who are or may come into possession of any portion or portions of said Fairview Manor apartments attorn to said receiver and pay him rental for the use and occupancy of such portion or portions.

3. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever, be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor Apartments, or any other matter relating to said project, or to the affairs of said corporation, and that said defendants and each of them be directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver until further order of this court.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by plaintiffs in opposition to motion of said Cash

Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein.

Dated at Fairbanks, Alaska, this 12th day of February, 1954.

JOE DIAMOND and
EARLE ZINN,

COLLINS AND CLASBY.

By /s/ WALTER SCZUDLO,
Of Counsel for the Plaintiffs.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

CROSS-COMPLAINT

Comes Now, Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaskan Corporation, and Fairview Development, Inc., an Alaskan Corporation; Bayview Realty, Inc., an Alaskan Corporation, and Fairview Development, Inc., an Alaskan Corporation, in their own rights, and cross-complains against the Plaintiffs named in the above-entitled cause to wit: Nelse Mortensen, Cliff Mortensen and Frank V. Hender-

son, individually, and for cross-complaint in the above-entitled cause, alleges and states as follows:

I.

That Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, all acting in alter ego through a corporation which was organized for their purposes, known as Nelse Mortensen-Alaska, Inc., which was not intended to be a separate corporation but was the alter ego of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, which corporation after the contract hereinafter referred to had been entered into, was dissolved by the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, purported to act as trustees of the Nelse Mortensen-Alaska, Inc., and as co-partners doing business as Nelse Mortensen-Alaska, Inc., undertook to perform all work and furnish all materials in construction of the buildings pursuant to the terms of the contract and obtained all of the $3,080,000.00 from the cross-complainants. That by the terms of said contract, they agreed to construct according to plans and specifications, certain apartments known as Fairview Manor, for the above-named cross-complainants, which they did not do and perform according to the terms of said contract.

II.

That the said Plaintiffs, above named, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, committed acts in violation of the terms of

said contract which materially damaged these cross-complainants who were then and now are the owners of said apartment buildings, by their failure to comply with the terms of said contract, plans and specifications, a copy of said contract being hereto attached, marked "Exhibit A" and made a part hereof as fully as if set out herein in full, and a copy of said plans and specifications are in the possession of the above-named plaintiffs and are hereby referred to and made a part of this cross-complaint by reference as fully as if a copy thereof was attached hereto.

III.

That the said Plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, violated the terms, covenants and conditions of said contract in the following manner and by so doing damaged these cross-complainants, as follows, to wit:

a. The contract, plans and specifications provided that the floor elevations of these buildings should be 435.50 feet above sea level and floor level as built is only 434.72 feet above sea level, making the average floor level of said buildings .78 of a foot lower than it should be; as a result thereof, the water from the melting snow in this vicinity will not drain and great volumes of water will and do drain into and around the basements of all of the buildings and thus cause great damage to the foundations, footings and basements themselves, and as a result thereof, the snow must be removed at an additional and great expense from the vicinity

of the buildings and all of the grounds on which the buildings are constructed and have caused the owners of the said buildings to suffer damage for the costs of the removal of the snow in the Spring of 1953, in the sum of $10,000.00; and that by reason of its condition, will average costing the Cross-complainants a like sum each year hereafter until some adequate relief is accomplished, and as a result thereof the Cross-complainants have been damaged in the sum of $100,000.00.

b. That said condition exists throughout all of the buildings except that Building No. 2 was built 1.21 feet lower than it should have been according to the contract, plans and specifications; that Building No. 3 was built .27 feet lower than it should have been built and Building No. 4 was built .58 feet lower than it should have been built, according to the plans thereof, and by a recap and amendment to said plans and specifications by which the contractors were bound, Building No. 1 was 9 inches lower than the plans and specifications called for, Building No. 2 was 1 foot 2½ inches lower than the plans and specifications called for, Building No. 3 was 3½ inches lower than the plans and specifications called for and Building No. 4 was 7 inches lower than the amended recap plans call for, which all wrongful acts brought about the damage placed in Paragraph (a).

c. These cross-complainants further allege that the ground floor levels vary in each building from 3½ to 4½ inches. On account of the drainage prob-

lems of the surrounding properties this is very detrimental to the property.

d. The front sidewalk on the "New C.A.A. Road" (Airport Road) is built below the highway at an elevation of from 12½ inches at the East end of Building No. 2 to 23 inches at the West end of No. 1. The cement walk is right at the toe of the bank and as the slope is dirt, the sidewalk is practically covered with mud, rocks and refuse which spills over onto the lawn.

e. Plan No. 2 provides for the planting of trees or hedge 3 to 4 feet in width and 1450 lineal feet in length and no part of said trees and hedge was ever planted, established or set out, and that the estimated cost of excavating, refilling with top soil and planting hedges and trees is $25,000.00.

f. That Plan No. 2 further provides that on each extreme side of each building there are shown two planting areas, one being 6 feet by 30 feet and the other being 6 feet by approximately 15 feet, with concrete curbs, top soil and shrubbery to be built, furnished and set in by the contractors in top soil and this has been entirely omitted, leaving undone 800 lineal feet of curb and setting out at least 40 shrubs and the grading surrounding the same and filling with topsoil; that the estimated cost of removing sand and gravel, filling with topsoil is $2,000.00, and the estimated cost of putting in curbs is $2,000.00, a total of $4,000.00.

g. Plan No. 1 shows that cement sidewalks from the West end of C.A.A. Road to and turning North on Cowles Street to the rear of the property was to be built—this sidewalk was never constructed. There is, however, a sidewalk outside the property line from a point 30 feet East of the West end which stops between Buildings Two and Three and there is no sidewalk on Cowles Street and there are no crosswalks from Buildings Three and Four to the property line as provided for in said plans and specifications, thereby leaving undone the building of 8,000 sq. ft. of sidewalks and crosswalks in the area last above described; that the cost of putting in said sidewalks and crosswalks is $15,000.00.

h. Plan No. 2—"Cube detail" showing 2 inches of asphaltic concrete on 12 inches of gravel. Concrete was substituted, but the 12 inches of gravel was not put under the concrete and the concrete is only 4 inches thick and was placed without proper and adequate foundation and is breaking and will continue to break and it will be necessary to repair and replace said defective concrete with 12 inches of asphaltic concrete as provided in the plans and specifications; that the cost of breaking and removing concrete in place is $5,000.00; the cost of excavating for classified gravel fill 12 inches in depth is $5,400.00; 2,600 yards of classified fill is $14,410.00; 2 inches of asphalt, 31,000 sq. yards @ $6.00 per yards is $186,000.00; a total cost of replacing said driveways being $255,810.00.

i. Plan No. 3—(Apt. E) shows guest closet at entrance door. These were all eliminated completely; that the cost to install 8 guest closets is $10,000.00.

j. Plans No. 7 and 8—show louvre vents at the ends of gables. Specifications #29:8-07 "Louvres" (a) Where located on plans, #26 gauge galvanized steel, size shown, with copper insect mesh on inside—the contractor did not install any of the louvres on said premises; that the cost of installation, by owner, of gable louvres is $6,000.00.

k. Plans No. 9 and 11 show handrails on wall sides of all stairways. These were never installed and no such handrails were ever placed there by the contractors, thereby shorting their contract with these cross-complainants to the extent of 1056 lineal feet of such handrails and the installation thereof; that the cost of the handrails and labor installation is $4,800.00.

l. Plan No. 11 shows 1¼ inch oak handrails running continuously from the ground floor to the second floor which has been stopped 4 feet short at entrance level and at landing level. (See M.P.R. #29:1207-7 — Handrail.) The specifications also called for handrails on all stairs, as well as walls or substantial balusters or guards on each side. Continuous handrails shall be placed on at least one side of every stair. Stairways 44 or more inches in width to have handrails on both sides. This was never done by the contractors. This cost is included in (k) above.

m. Plan No. 9 shows apartment entrance doors, S.C. (self-closing). These closers were never installed. The cost of 32 door closers @ $32.50 each is $1,040.00; cost of installation $300.00. Total cost $1,340.00.

n. Plan No. 10 provides and calls for 6 inch concrete base in garages and the said contractors failed and neglected to install this base. A great percentage of the garages and, in most cases, plasterboard walls were used and are from 1 to 3 inches above the floor, leaving said garages unfinished, unsightly and greatly decreasing the value thereof. The cost of putting said garages in condition contemplated by plans and specifications is $5,000.00.

o. Plan No. 10—With reference to finish schedules of bathroom walls, these were to have Colotyle 4 feet above floor and 6 feet above tub and the contractor only furnished and installed Colotyle 4 feet above the tub and omitted completely to install Colotyle on other walls to the extent of approximately 4,000 sq. feet. The cost of additional 4,000 sq. feet of Colotyle, to install as required by plans; the cost of disconnecting and reconnecting plumbing in each bathroom to finish bathrooms is $50,000.00.

p. Plan No. 10 specifically provided for wood bumpers in all of the garages to be 6x6 inches, and the contractors installed only lighter and less expensive bumpers which are 4x6 inches and not safe for the stopping of cars coming into said garages; that the cost of installing bumpers, according to the plans

and specifications, is $3,000.00 for labor and material.

q. Plan No. 11 required the contractors to install wardrobe sliding door frame and casings to be of oak. The contractor installed only the bottom of slideway in oak and the balance in pine or fir; that the cost of installing oak as the door frames and casings of said wardrobe closets is $500.00.

r. Plan No. 12 provided that the contractors should install 6x6 inch WF 15.5 lb. steel "I" beams over stairs and end bedroom, and the contractor substituted this with a timber 4x12, shorting these cross-complainants 640 lineal feet of 15.5 steel "I" beams, also a shortage of wood timbers to the extent of 2560 board feet; that the cost of the steel "I" beams required by the plans and specifications is as follows: Cost of steel beams, $2,560.00; additional lumber, $350.00; labor installing beams, $25,000.00 for installing 2 beams on 32 stair landings. Total cost $27,910.00.

s. Specifications Addendum No. 4: P. 38 (b) "Trim" Para. (b) revised to read: "¾x3½" stock molded base on all walls and partitions throughout buildings, except in garages." All base is ⅜"x3½" bull-nose and greatly detracts from the appearance and strength of said base and trim; that the cost of installing base trim according to plans and specifications, 54,400 lineal feet @ 35c per foot is $19,040.00.

t. Specifications No. 5: General conditions. "Changes in the Work. The owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extensions of time caused thereby shall be adjusted at the time of ordering such change.

"In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purpose of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owners signed or countersigned by the Architect or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered." Demand has been made to correct the above and foregoing failures to comply with the terms of the contract and the contractors have failed, neglected and refused to correct and finish their work.

u. Specification No. 5 further provides that the completed property shall be equal to or exceed the requirements of the FHA minimum property requirements for properties of three (3) or more living units, revised in August, 1948, which includes "General Acceptability Requirements" of the "Min-

imum Planning Requirements," and the "Minimum Construction Requirements" and also provides as follows:

Spec. #29:8-06 (c) "Vent Ducts": Electric dryers in laundry to be vented through wall. The dryers are vented into the garages, thereby putting the moisture into and on cars, causing condensation in Summer and freezing in Winter. The cost of venting said dryers through the outside wall is $500.00 for each of 8 vents, a total of $4,000.00.

Spec. #30-31:9-04 (e) "Aluminum roofing shall be grounded at 3 places per building for protection against lightning. Ground rod will be galvanized pipe with a minimum diameter of ½" aluminum rod or pipe not acceptable. Conductor shall be aluminum with #6 minimum wire size. Clamps used for connections shall be aluminum or galvanized metal." The cost of grounding aluminum roofing at 3 places on each of 4 buildings is $3,000.00.

v. Specification #39:12-09 (b) "Linen closets fitted with six (6) spruce or hemlock shelves." There are only 4 shelves in each linen closet, shorting the owners the cost of building additional shelves and the furnishing of 1,040 lineal feet of shelf material. The cost of material and labor to install 6 shelves in 272 linen closets is $7,500.00.

w. Specification #44:14-10 "Lettering: (a) Black paint 1½" letter. (b) On doors to each space hereafter noted. (c) Laundry. (d) Locker and garage numbered." The contractors failed, neg-

lected and refused to do any of said lettering as specified and did no lettering whatsoever on any part thereof. The cost of metal numbers and installation of same is $1,000.00.

x. Specification #49:16-09 (f) "I Doors (Metal fire doors in Basement Stair Opening) 15"x3½" metal bevelled or round-edged push plate on stair side; with 8"x2" cast iron door pull on reverse side. 1½ paid steel butts." 32 doors have no such hardware, except substituted butts. The cost of butts is $72.00; push plates, $280.00, labor for installation $500.00. Total cost $852.00.

y. Specification #49:16-12 "Closers: (a) A-B-I doors shall be equipped with two (2) speed door closers of the rotary piston or ratchet and pinion type of required size to adequately handle doors. Noiseless in operation. Provided with soffit brackets where side jamb clearance is restricted." The contractor violated this provision, which shorted the cross-complainants herein by installing door closers only on front and rear outside doors and not on "B" and "I" doors—shorting the owners 392 doors of the closers above provided. The cost of 392 door closers @ $32.50 each is $12,740.00; labor $2,000.00; total cost $14,740.00.

z. Specification #50:16-14 "Rail Brackets: (a) Furnish two inch '2' wrought steel plated brackets for wall hand rail all stairs. Two to each stair run." Contractors failed, refused and neglected to furnish

any and all of such rail brackets. The cost of installing wall brackets, $350.00.

aa. Specification #50:16-15 "Card Plates: (a) Furnish 1⅛"x2⅛" pressed steel plated card plates for each apartment entrance door." Said Contractor failed, refused and neglected to furnish any such card plates on 272 apartment doors. The cost of 272 card plates and installation thereof is $277.20.

bb. Specification #50:16-16 "Numerals-Letters: (a) One inch (1") pressed steel plated numerals and/or letters at each apartment entrance door and at each building entrance." The Contractor failed, refused and neglected to install numerals on the 272 apartment doors. The cost of the apartment numbers is included in "w" above.

cc. Specification #50:16-18 "Hooks (a) Heavy steel wire coat hooks. Six (6) to each closet." The Contractor failed, refused and neglected to furnish 2,640 hooks, thereby shorting the owners. To furnish hooks for clothes closets in 272 closets and install the same is $570.00.

dd. Specification #53:17-10 "Fire Extinguishers (a) Contractors agreed and became obligated to furnish one (1) each in every stairwell and one (1) each in each boiler room, 2½ gallon soda and acid fire extinguishers approved by Underwriters, labeled for class A-1 fires, to be hung on brackets with upper rim 5 feet from the floor." Contractors failed, refused and neglected to install such extinguishers, thereby shorting the owners 36 fire extin-

guishers. The cost of 36 fire extinguishers @ $34.00 each is $1,224.00 and the labor for installing holders is $230.00. Total cost, $1,454.00.

ee. Plan No. 1 shows two water wells. Only one (1) well has been provided. The cost of drilling a well 306 ft. with 8-inch casing; 51 feet with 6-inch casing; 40 ft. of 4-inch standpipe in casing is $15,-000.00.

ff. M.P.R. #17:1117-A-B "General." Where the location of the property and the type of living units indicate that children will occupy the living units, equipment and play space, adequate area and suitable location shall be provided.

For properties having a large number of living units, generally provided enclosed children's playgrounds, usually are located to be easily accessible from the living units without encountering traffic hazards, or (2), located in rear areas, at the end of buildings, or in other locations where they will not impair views from or use of the living units, (3) adequate for the expected need, generally at least 2,500 sq. feet per 100 living units, and (4) provided with durable equipment of proper sizes for both preschool and school children. Equipment shall generally be arranged to provide separation of preschool children from older children. The following equipment, or its equivalent shall be provided for each 100 living units served:

2 benches about 6 feet long for adults.
1 slide.

1 small bench for children.
1 sand box of at least 100 sq. ft. area.
2 swings and 1 teeter for preschool children.
2 swings and 1 teeter for school children.

The contractors failed to establish any play yards and made no provision for furnishing equipment therefor. The play areas should have been enclosed and should provide 3 each of the above listed appurtenances. See M.P.R. #73:1914 (a). The contract and specifications further provided for the contractor to finish and build fences and free-standing walls. Fences and free-standing walls shall be installed along property boundary lines, around laundry yards, refuse collection points, playgrounds and in other locations where necessary for protective or screening purposes. They shall be appropriately designed for the function intended and shall be substantially constructed to withstand conditions of soil, weather and use. Enclosures for laundry drying yards shall be approximately 6 feet high. Enclosures for playgrounds shall be approximately 3½ feet high. None of these were installed by the contractors and none were even furnished. The cost of grading, filling, enclosing, making sand boxes, swings, benches, slides and teeters for three playgrounds is $5,000.00; that of fencing and installation of three playgrounds is $6,800.00, a total cost of $11,800.00.

gg. M.P.R. #69:1901-B. "Grading and Drainage. Grading and drainage shall be performed so

that water will drain away from the buildings on all sides and off the site in a manner which will provide reasonable freedom from erosion. Construction, such as walks, driveways and retaining walls shall be installed so that they will not interfere with drainage." None of this was furnished, performed or done by the contractors. The cost of drainage is $20,000.00; raising sidewalks to grade, $14,928.00; putting on topsoil, $11,900.00; labor, $15,000.00, a total cost of $61,828.00.

hh. M.P.R. #71:1907-A-B "General. Catch basins, manholes, drainpipes, headwalls, etc., shall be installed and connected with proper outlets where necessary to provide adequate run-off of storm water and to protect against erosion or other damage by surface water or ground water. Outlets shall be approved by the owners of the properties affected and local authorities having jurisdiction." None of this was done by the contractors. This cost is included in "gg" above.

ii. The specifications provided that the contractor would "at all locations where surface water pockets, install catch basins and properly connect them to adequate and positive means of water disposal." This cost is included in "gg" above.

jj. M.P.R. #72:1911—The contractor was required to construct sidewalks of Portland cement or other durable hard-surface with sufficient slope to provide immediate disposal of surface water off the walks. The said walks were not to be left so as to

act as drainage channels. The location, width, alignment and gradient, were to be constructed in accordance with the plans and specifications. None of this was done by the contractors. This cost is included in "gg" above.

kk. M.P.R. #74:1916-B-C "Finish Grade Elevations Around Buildings. Finish grade elevations around buildings shall provide continuous slopes away from the foundation walls. Where any slope away from a building meets a slope toward a building, the bottom of the swale or valley formed by the two slopes shall be at least 1 foot below the finish grade elevations at the walls, shall be pitched to provide surface water runoff and, except as prohibited by nearness of lot lines, shall be at least 10 feet away from the foundation walls." The contractors did not comply with this specification. This cost is included in "gg" above.

ll. The specifications required all unpaved areas of the finished grade elevations to provide for continuous slope off at least 6 inches on 25 feet (2% gradient) to lower elevations off the lot, or to drainage structures on the lot. Where catch basins or inlets are installed, the finish grade elevations of adjoining areas shall provide for emergency surface overflow without flooding against the buildings. None of this was complied with by the contractors. This cost is included in "gg" above.

mm. The contractors did no grading of the premises and when they left the premises, they left it in

such condition that from 1 to 3 inches of water was standing on the greatest portion of the sidewalks and driveways to such an extent that tenants or other persons could not get into the apartments without having boots on or wading through water to the entrance. This cost is included in "gg" above.

nn. According to the terms of the specifications, there are four (4) boiler rooms in the project and each was to include a concrete sump constructed so that any water getting on the floor of the boiler room would drain into said sumps. Contractors did not arrange the sumps to carry this water and the water that gets on the floors from any source must be swept into crevices which have had to be dug in the concrete floor for drainage. The cost to put in drainage sumps is $6,000.00.

oo. The wardrobe doors have not been installed, as provided for in the plans and specifications. Some rough substitutes were made and installed which were patched up. The rough openings built by the contractors were apparently too large for the small trim around the same and would not cover the ends of the plaster board, creating a very unsightly and unfinished condition, and several of the outside door jambs were left with cracks between the wood and the concrete.

The concrete drives and curbs are uneven, crooked and "pock-marked" and were left in this unfinished condition.

The plasterboard in the garages does not extend to the floors, resulting in large cracks or openings around the floors to the extent of being 2½" high.

1. The cost to put the wardrobe doors in condition specified in the contract is $5,000.00.

2. The cost to finish drives and curbs is $3,500.00.

pp. The contractors failed to comply with Specification #37:11-07 "Siding in the following manner, to wit: The specifications called for ⅜" waterproof plywood exterior type, Grade A-C with shiplapped joints. All joints to be bedded in thick lead and oil paste. Attached with 6d hot-dipped galvanized nails not over 12" apart." The contractors evaded the terms of this specification and did not shiplap the joints, but made butt joints; did not fill the joints with thick lead and oil paste, did not nail them with 6d hot-dipped galvanized nails, but used ordinary steel box nails which has resulted in rusting and they will soon be rusted out. On Building No. 4, the nails were 6d box nails and on the others 4d box steel nails. All the nails are rusted the full thickness of the siding. The wood strips covering the joints have all come loose and are crooked. The vertical joints are opening up and, for a distance of about 40 feet on Building No. 2, the plywood has buckled and has opened up the joints in places at least 3 inches from the building. In many other places the siding is bulging out.

The cost to replace the siding, according to the plans and specifications, is $300,000.00.

qq. The contractors did not comply with the specifications in flashing over the garage doors. The flashing, as used, has been spliced in many places, amounting to 126 splices out of 130 openings and is of little or no use to the building, and will have to be removed and replaced at the additional cost to the owners, when it is clearly a shortage of the contractors. The cost to remove and replace the flashings is $2,000.00.

rr. Specification #16:3-04 "Grass: (a) Lawn areas of natural grade shall be plowed, harrowed and dragged. Stones of one inch (1″) diameter, or more, shall be removed from the surface of all lawn areas. All lawn areas shall be brought to a smooth, even surface and to established grades shown, with not less than four inches (4″) of topsoil thereon." This was not complied with at all and no effort was made by the contractors to do so. There are rocks up to 4″ in diameter on the surface of the ground of "lawn," and the soil is clay and/or sand. The cost to prepare the plot, sow and cultivate the grass lawn is $5,000.00.

ss. M.P.R. #61:1703-B 5.d. "Each public stairway and each public hallway shall be provided with not less than one outlet." There are no outlets in the halls, except in Building No. 3 which the manager installed. The contractors did not comply with this section of the specifications at all. The cost to install outlets, per the plans and specifications, is $3,000.00.

tt. The bathrooms are improperly finished, the plasterboard in many of them does not fit the bathtub, leaving large, unsightly cracks showing, and many nails are popping out of the plasterboard that were not driven in far enough to spackle sufficiently. The cost to finish the bathrooms, per the plans and specifications, is $100,000.00.

There are 28 reinforced concrete firewalls in the project, with openings through them in the basements. On both sides of these openings there are fire doors. Over the top of the fire doors there are several heating and electrical pipes on the ceiling that pass through this wall. The voids between these pipes were never filled with mortar or fireproof material and are a fire hazard of the worst kind, and the cost of remedying this fire menace will be $20,000.00.

uu. The contractors left many exposed and crude wood surfaces in the buildings which were not painted and finished in any way. The estimated cost to eliminate unsightly unfinished and exposed wood surfaces is $3,000.00.

vv. The contractors defectively installed on front of buildings Nos. 1 and 2, dirt grade against the plywood on the buildings for a distance of about 47 feet, and there is dirt thrown up against this as high as 10 inches, in violation of the plans and specifications of this contract which require that there be a minimum of 6″ of concrete above all dirt grade.

The cost to comply with the plans and specifications regarding fill against plywood is $10,000.00.

ww. The contractors constructed Buildings Nos. 1 and 2 in places other than the specifications and plans provided, and too close to the property line thereof. The damage on account of placing Buildings Nos. 1 and 2 in the wrong place amounts to $60,000.00.

xx. Plan No. 9 provides for apartment entrance doors to be S.C. (self-closing). The contractors did not so install said doors and did not provide closers therefor, and did not install the doors in such a manner that closers can be properly used as provided in the plans and specifications. The cost of installing door closers is included in "y" above.

yy. The contractors are not to be relieved from their liabilities by reason of the approval of the FHA Minimum Requirements, but must all be approved by the owners, which has never been done in this matter, all of which is called for in the contract, plans and specifications.

zz. The contractors did not comply with specification #29:8-06 (c) "Vent Ducts: which provided that electric dryers in laundries were to be vented through walls. The contractors, for the purpose of saving money and shorting the owners, vented these dryers into the garages, thereby putting moisture into the garages and on the cars, causing condensation in Summer and freezing in Winter.

aaa. The contractors failed to comply with Plan No. 2, which shows the dimensions of side and rear driveways to be 30 feet and 18 feet respectively. There is only one driveway of 30 feet in width and all the others are narrower than provided by the specifications, skimpy and improperly built. The cost to construct driveways, according to the plans and specifications, is $25,000.00.

bbb. The contractors failed to comply with Plans Nos. 7 and 8, which require all exterior gables to be finished with 1″x8″ joint cedar siding. The contractors did not furnish or use said siding at all, but substituted plywood laid with butt joints and no moulding over the joints. The same is warping and decaying and will have to be replaced by cedar siding. The cost to replace gable covering is $20,000.00.

ccc. The contractors failed to complete the casings of the windows and doors and other openings throughout the entire 272 apartments. They have left openings uncased, leaving cracks between the plasterboard joints. The casings and the doors are cracking and crazing vertically on both sides and the veneer covering is loose at edges, due to the fact that the contractors used second-grade doors when, by the terms of the contract and plans and specifications, they were required to use first grade. This applies to all of the doors and windows and casings in the entire apartment buildings. According to the plans and specifications, approximately 1,304 win-

dows were to be screened. No screens were put on any windows.

Cost of 272 doors and casings meeting specifications	$19,460.00
Labor installing 272 doors and casings	12,423.00
Cost 1,304 windows	50,000.00
Labor replacing windows and casings.	50,000.00
Cost 1,800 screens and labor installing same	8,000.00
Total	$139,883.00

ddd. The contractors failed to finish up the kitchens in all of the apartments, according to the plans and specifications, which provided that 1/8" linoleum top and back (splash) was to be furnished 18" high, and most of the kitchens were finished with the back only 9½ to 10" high.

The contractors failed to lay greaseproof tile in the kitchens of 250 apartments, according to the plans and specifications, and thereby shorted the owners of 15,000 sq. ft. of greaseproof tile.

The cost of finishing the kitchens by installation of specified linoleum on top and back (splash) of cabinets and sinks is $16,000.00, and the cost of removing the present tile and laying 15,000 sq. feet of greaseproof tile is $15,000.00.

eee. The contractors failed to comply with the specifications in the following items, to wit:

In addition, in each building, it has been found that no trenches in the floating slabs, as shown on

the drawings, to accommodate sewage outflow were installed, or provision made therefor. As a consequence, when installations were accomplished, to provide outflow, the essential re-enforcement steel in the slabs, such as was installed, was out and the concrete in the trenches was then provided after the slab was poured, laid and set, was removed, and in many instances, re-enforcement steel was not placed properly as called for by the plans, specifications and drawings, so as to provide prescribed re-enforcement; thus, the methods employed in construction destroyed the design characteristics of the floating slab foundation which produced and resulted in great settlement and cracking of the floating slab foundations, produced a warping and an uneven settlement of all the buildings. Damage by settling due to the necessity of cutting floating slabs of re-enforced concrete is $100,000.00.

IV.

Cross-complainants allege that by reason of the breaches of the contract, plans and specifications above enumerated, these cross-complainants have been damaged in the sum of $1,214,431.00.

V.

These cross-complainants further allege that by reason of the constractors having failed to comply with the terms of the said contract, plans and specifications, these cross-complainants have spent unduly in doing that which the contractors were required to do under the terms of the contract, large sums of

money, to wit: the sum of $141,612.15, all of which was the result of the wrongful acts and deeds of the contractors, and that these cross-complainants are entitled to recover of and from the contractors, this additional sum of money, to wit: $141,612.15.

Second Cause of Action

I.

These cross-complainants further allege that on or about the 29th day of April, 1952, one of the defendants, Cliff Mortensen, caused to be made, executed and delivered, an affidavit that was false and known by him to be false at the time, which affidavit was delivered to the National Bank of Commerce, in Seattle, Washington, for the purpose of drawing down funds there belonging to these cross-complainants to the extent of $311,687.68, and by making said false affidavit, the said Cliff Mortensen, acting for and on behalf of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, obtained, took, kept, and now holds a said sum of money which really belongs to these cross-complainants.

II.

And on or about the 7th day of May, 1952, the said Cliff Mortensen made a false affidavit, knowing the same to be false at the time he made it; caused it to be delivered and filed with a bank in Seattle, and by reason thereof was able to wrongfully draw down and take money belonging to these cross-complainants to the extent of $10,125.49,

no part of which was due Nelse Mortensen, Cliff Mortensen and Frank V. Henderson.

III.

Thereafter, and sometime after the 9th day of October, 1953, the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson fraudulently, and through false representation did draw from a bank in Seattle $8,800.00, lawful money of these cross-complainants, which money represented the contract price due for landscaping of said apartments when, in truth and in fact, each of the parties, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, knew that the landscaping had not been done and no part thereof had been done, and therefore wrongfully and fraudulently obtained $8,800.00 from the cross-complainants, which money belonged to them; therefore wrongfully obtaining and are holding $330,613.17 which belongs to these cross-complainants; and that the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, being justly indebted to these cross-complainants for the said sum, should be required to account therefor.

IV.

That by the terms and provisions of the said contract, the contractors, Nelse Mortensen-Alaska, Inc., undertook to provide the owner with the assurance of the completion of the contract in the form of an indemnity agreement in the amount of Two Hundred Ninety-five Thousand Nine Hundred Twenty

($295,920.00) Dollars, and the payment of the following items in connection with the project:

(a) Interest on the mortgage loan during construction;

(b) Insurance required during construction;

(c) FHA mortgagee's insurance premiums;

(d) FHA examination fee;

(e) FHA inspection fee;

(f) Financing expense;

(g) Title and recording expense,

and Nelse Mortensen-Alaska, Inc., further agreed in the event the owner paid any or part of the above items (a) to (g), inclusive, the owner would receive a corresponding credit on the contract price.

V.

That the defendants refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, the following items, to wit: Interest on mortgage due January 1, 1952, in the amount of Nine Thousand Seventy-five and 26/100 ($9,075.26) Dollars and thirty (30) days delinquent interest in the amount of Thirty and 25/100 ($30.25) Dollars; interest on Mortgage due February 1, 1952, Nine Thousand One Hundred Ninety-four and 76/100 ($9,194.76) Dollars, real estate taxes levied August 1, 1951, Thirty-one Thousand Six Hundred Twelve ($31,612.00) Dollars; that due to the neg-

lect, failure and refusal of the defendants to pay said items, cross-complainants herein made the payments. That repeated demands have been made on plaintiffs herein to reimburse cross-complainants for said payments, but said plaintiffs have refused and neglected to so reimburse cross-complainants contrary to the terms of the contract herein referred to, with interest at six per cent (6%) per annum on the various amounts hereinbefore mentioned.

Wherefore, these cross-complainants pray judgment against the above-named plaintiffs, to wit: Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as follows, to wit:

1. On cross-complainants' First Cause of Action, the sum of $1,356,043.15.

2. On cross-complainants' Second Cause of Action, the sum of $380,525.44.

3. And the reasonable sum for cross-complainants' attorney fees, together with the costs of disbursement incurred herein, and for such other and further relief as to the Court seems just and equitable.

WARREN A. TAYLOR, and
BELL & SANDERS,

By /s/ WARREN A. TAYLOR,
Of Cross-Complainants'
Attorneys.

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath, deposes and says: That he is one of the defendants and cross-complainants in the above-entitled action; that he has read the foregoing Cross-Complaint, knows the contents thereof, and that the same are true as he verily believes.

/s/ CASH COLE.

Subscribed and Sworn to before me this 22nd day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

Lodged February 23, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Tom Cole, being first duly sworn, upon his oath deposes and says:

That since April, 1953, I have worked for Fairview Development, Inc., in its apartment project known as Fairview Manor, at Fairbanks, Alaska, and since June, 1953, have been in charge of maintenance.

During the period since April, 1953, improvements have been made in the heating and water distribution systems which have materially reduced the cost of operation.

All of these improvements have consisted of correcting the errors of the general contractors, and their sub-contractor, A. G. Rushlight, who did the mechanical work on the project. These errors existed at the time the contractors secured their final payment, and about $141,000.00 was spent out of the rentals making these corrections which were the prime responsibility of the contractors.

The expenditure of these funds has resulted in a saving of over $15,000.00 per year in electricity, water, heat and labor.

That when the manager, Cash Cole, took possession of said Fairview Manor, it was found that the contractors had done such a poor job that it was with difficulty that the place could be kept open. Rental money had to be ploughed into the project to keep going, and to do things that the contractors had failed to do under their contract.

Affiant has read the affidavit of Cliff Mortensen, and in reference to statements contained therein, denies that affiant was present at any conference re-

garding the settlement of the above-entitled cause after the 6th day of October, 1953, and had no knowledge of what was transpiring, as Dick Rushlight was doing all the negotiating with the attorneys for plaintiff, as a purported friend of Cash Cole.

That at the time affiant was conversant with the income of Fairview Manor, and the cost of operation of the same, and affiant advised Dick Rushlight, after the negotiations were completed, that it was an utter impossibility to purchase Mortensens', Henderson's and Nowell's stock on the terms set forth in the agreements, and also pay Rushlight $25,000.00, according to the terms of a demand note Rushlight had induced Cash Cole to sign, but Rushlight ignored the said information and had Cash Cole sign the said agreements and note. Affiant also informed Mr. Jaureguy, one of Cash Cole's attorneys, that the terms of the agreement were impossible of fulfillment, but no attempt was made to prevent Cash Cole from signing. At the time the negotiations were going on, no persons were allowed to visit Cash Cole, who was confined to bed with a severe heart attack and was taking drugs which dilated his eyes to such an extent that he could not read, and had to depend upon what was told him by Dick Rushlight. Affiant or Mrs. Ruth Cole were not present at the time of the signing of the said agreements and note.

That it was several days after the agreements and note were signed before Cash Cole was able to read

the same, and Cash Cole was very surprised to ascertain that Rushlight had secured his signature to said note for $25,000.00, when no money was owed by Cole to Rushlight.

That affiant denies that Mr. Jaureguy and Dick Rushlight did confer with Cash Cole from day to day from the date of Cash Cole's heart attack until the agreements and note were signed. That for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, as Cash Cole was an extremely sick man, and was not physically or mentally able to do so. Affiant was advised by Dr. Ribar to this effect, and it was also very apparent to affiant.

When the Stipulation was signed, the stock was supposed to be turned over to Cash Cole, as the President of Fiarview Development, Inc., but although repeated demands have been made for said stock, plaintiffs have protested the delivery of said stock to Cash Cole, which stock has heretofore been held in escrow by Roy Sumpter, of the Washington Mortgage Company, Central Building, Seattle, Washington. That when Cash Cole requested said Roy Sumpter to deliver the stock to him, Josef Diamond, attorney for the plaintiffs, objected, although the escrow under which said stock was held had ended, and Cash Cole's stock should have been delivered to him.

Furthermore, Cash Cole was not bound to deliver the stock to plaintiffs, when he ascertained that he

had been induced to sign the instruments and note while unable to comprehend the import of said documents.

That Cliff Mortensen and Frank Henderson have not endorsed over their stock in Fairview Development, Inc., to Cole, as required by said instruments.

That as soon as Cash Cole was able to read and understand the nature of the instruments he had signed, and was aware that, by the provisions of the same, he had virtually conveyed all his interest in Fairview Development, Inc., to the plaintiffs without any consideration whatsoever.

When Rushlight and Mortensen settled their suit and Rushlight was paid $125,000.00 by Mortensen, that settled a matter strictly between them and was of no concern to Fairview Development, Inc.

Fairview Development, Inc., did not owe Mortensen and Henderson any money, but to the contrary, Mortensens and Henderson, by reason of not finishing the project for which they received the sum of $3,080,000.00, became indebted to Fairview Development, Inc., in the sum of $1,356,043.15 for shortages in the building contract and the sum of $380,525.44, which represents money drawn against the contract for work and materials which was not utilized on the buildings, as more fully shown by the allegations of defendants' Cross-Complaint lodged herein.

In response to Cliff Mortensen's statement that he and Henderson were unaware of the financial condition of the Fairview Development, Inc., affiant

states that Cliff Mortensen hired a C.P.A. in 1952, who audited the books and rendered a report to Mortensen and Henderson. That Fairview Development, Inc., had to pay out several thousand dollars to the C.P.A. hired by Mortensen and Henderson. That Mortensen employed a bookkeeper for Fairview Development, Inc., who turned up $2,700.00 short in her accounts.

Affiant further states that neither he nor Mrs. Cash Cole had any appreciable knowledge of the contents of the instruments signed by Cash Cole, and further states that Cash Cole was unable to read the said instruments for a week after the execution of the same. That no person was ever in the bedroom of Cash Cole long enough to have read the Stipulations, agreements and note to him.

In reference to the affidavit of Frank V. Henderson, affiant denies that any exorbitant salaries were paid to anyone, nor were apartments furnished free to any employee, except as a part of their compensation.

That Henderson is not telling the truth when he states that there was antagonism between Cash Cole and the tenants. The only indications of what might be considered antagonism was that while Cash Cole was in the States on a business trip, the bookkeeper employed by Cliff Mortensen had allowed about 100 tenants to move into the project without signing leases. That upon his return, he went to the tenants regarding their signing leases

and encountered some grumbling on the part of the tenants.

Affiant further states that Frank V. Henderson is indebted to Fairview Manor in the sum of $2,426.00 for apartment rent while he and Mortensens were constructing Island Homes on Bentley Island. This claim has been placed in the hands of the corporation's attorneys for collection.

As stated before, the faulty construction of Fairview Manor by the plaintiffs and their failure to perform a great deal of the work required by the plans and specifications, and which has been done by the management, has caused the project to have a difficult time paying its way.

The fixed charge, under the mortgage, is $21,700.00 per month. Out of this, all taxes, insurance and ground rental are paid.

By the expenditure of approximately $141,000.00 of the rentals, the buildings and equipment were put in condition to reduce overhead costs of operations. Wages were cut $10,000.00 in 1953; cost of electricity, heat and other facilities was reduced at the rate of approximately $15,000.00 per year, so that now, with 20% vacancy during the Winter months when costs of operation are highest, the project can maintain its payments on the mortgage, together with interest, insurance, taxes, land rental and all operating costs.

For the first time since the occupancy is Fairview Manor able to operate efficiently and economically.

As one instance of the flagrant disregard of the contractors to abide by the plans and specifications of said project was the fact that the contractors drilled one well, whereas the plans called for two wells. It was found that one well could not supply the 50,000 gallons of water necessary for the 272 apartments and the boilers and laundries, so it was incumbent upon the defendants to drill another well 351 feet at a cost of $16,000.00. This example can be multiplied many times, and is more fully shown by the Cross-Complaint lodged in this action to which reference is hereby made.

/s/ TOM COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Ruth Cole, being first duly sworn, upon her oath, deposes and says:

That during the trial of the above-entitled cause in the early part of October, 1953, affiant's husband, Cash Cole, suffered a severe heart attack, which necessitated medical care and complete isolation and rest. This heart attack occurred during the night of October 5, 1953.

That by reason of said heart attack, Dr. Ribar advised complete rest and ordered Mr. Cole not to take further part in the trial of the case, in which he was one of the defendants.

That Mr. Cole was placed in bed and for three or four days the only persons allowed in his bedroom were affiant, Tom Cole, his son, and Dr. Ribar.

About the 7th or 8th of October, 1953, Dick Rushlight, who purported to be a friend of my husband, got into his bedroom and discussed a settlement of the lawsuit which was then on trial, and also negotiated regarding selling his stock in Fairview Development, Inc., to Mortensens or buying their

stock and also buying some stock of Everett Nowell in Fairview Development, Inc.

That affiant or Tom Cole took no part in said negotiations, nor were they present when Rushlight was talking with my husband over a period of several days.

That during the time Rushlight was conferring with my husband, my husband's eyes were in such a condition that he could not see. He was also very weak and was not mentally alert and able to transact business.

Rushlight finally brought several papers into Mr. Cole's bedroom and Mr. Cole signed them, but he did not know what the papers contained for several weeks after they were signed.

That when he was able to read the papers, he was very astonished and angry, as he knew and stated that it would be impossible to make the payments to Mortensens and Nowell, as provided therein. He was further surprised that Rushlight had also had him sign a demand note for $25,000.00, as he, or Fairview Development, Inc., did not owe Rushlight any money.

That Mr. Cole was a very sick and weak man for several months following the heart attack, and during the past month or so has been confined to his bed for several days at a time.

That affiant believes, and therefore avers, that Cash Cole at the time he signed the stipulation with

Mortensens and Henderson, and the agreement with Nowell, and the demand note to Rushlight, was unable to read, nor was he able to understand and transact any business.

That affiant did not, nor did Tom Cole, participate in the negotiations which led up to the execution of the documents hereinbefore mentioned.

/s/ RUTH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he has read the affidavits of Everett Nowell, Cliff Mortensen, Frank V. Henderson, Josef Diamond and Earl Zinn in opposition to the defendants' Motion to set aside and vacate the Stipulation and Judgment based thereon, and in reply thereto states as follows:

In reference to the affidavit of Cliff Mortensen, affiant denies that there was any deadlock in the management of the properties of the corporation, Fairview Development, Inc.; and denies that at any time had there been any mismanagement of the properties of the corporation; nor was there any improper disposition of the funds and assets thereof, and alleges that the properties were well managed by affiant.

Affiant admits that at the time of the trial of said cause, Cake, Jaureguy and Hardy, attorneys at law, of Portland, Oregon, appeared as attorneys for affiant. That John E. Hedrick and Stephen J. Morrissey, of Seattle, Washington, did not appear

in said cause on behalf of this affiant; but did appear as counsel for Everett Nowell. That Hedrick & Morrissey did, at the instance of Everett Nowell, institute an action against Mortensen and Henderson in the U. S. District Court at Seattle, Washington. That affiant was opposed to bringing said action in Seattle. Affiant felt that the proper place to bring an action against the Mortensens and Henderson was in this Court, where the property is located.

That an action brought on a proposed cross-complaint in the cause No. 7298 will fully adjudicate the matters in dispute herein. That an investigation by an architect disclosed that the plaintiffs stole in excess of One Million ($1,000,000.00) Dollars in the construction of Fairview Manor at Fairbanks, Alaska, by skimping on materials and by failing to do the work specified in the plans and specifications of said project, and by false and fraudulent affidavits that the job was completed, did draw the sum of $311,687.68 from the National Bank of Commerce at Seattle, Washington, knowing at the time that said affidavit was false, and knowing that the project was not completed.

That the plaintiff, in May, 1952, drew the further sum of $10,125.49, money of defendant corporation, Fairview Development, Inc., and did, in the month of October, 1953, draw $8,800.00 from said bank, which said money was to be used for landscaping the grounds surrounding the Fairview Manor. That

no part of the landscaping provided for in the plans was done by plaintiffs.

That by reason of the failure of the plaintiffs to finish the construction of Fairview Manor, and their doing completed work in such an unworkmanlike manner, and with the use of inferior materials, defendant was compelled to use the sum of $141,000.00 derived from the rentals to complete the building and re-do inferior work of the plaintiffs. That the use of the rent money, as aforesaid, placed the company in a bad financial condition, although by practicing strict economy of operations, the company has been able to meet all of its obligations, including payment of principal and interest on the loan for construction, taxes, ground rent, insurance, etc. That during the present Winter, the vacancies have been from 50 to 71, which reduces the income to a point where income and expenditures are approximately the same.

That affiant has been the manager and part owner of Fairview Manor since the opening of the first building on August 1, 1951. The other three buildings were rented as they were finished, the last building, No. 3, in December, 1951. That so many things were left unfinished, and so many things engineered and done wrong in the boiler rooms that it immediately became a continuous struggle and necessitated the outlay of money to keep the project in operation. The problem was not that of maintenance, but of construction corrections, which necessitated the expenditure of approximately $141,000.00

to the end of September, 1953. That this is more money than the project could afford, and, as a result thereof, it is without any cash balance. That the examiner for the mortgagee required that the buildings, due to poor construction, be painted on the outside during the summer of 1953, and required numerous other corrections, most of which have been done, with the exception of the exterior painting, which will cost about $15,000.00. That affiant was unable to do this, as the money had to be spent on more important things, so it remains a requirement for 1954. That there is very little chance of this being accomplished, since the project has been operating during the present Winter with many vacancies. That February 1, 1954, there were 71 vacancies out of 272 apartments in the project.

That notwithstanding the heavy loss of tenants during the present Winter and during the Winter of 1953, the corrections which have been made mechanically and business-wise have made a saving which has permitted affiant to meet all obligations to date, with the exception of a note, payable May 30th, in the amount of $7,500.00. That, as of February, 1953, the project was obligated for debts amounting to more than $20,000.00 which were not paid until the middle of the Summer of 1953. During the year of 1953, affiant was able to effect a saving of $15,000.00 over the operation of 1952, and 1954 should show a greater gain. That the saving in labor costs was over $10,000.00.

That immediately after construction began, it became apparent that the Mortensen interests viewed the project from the angle of getting all the money possible from construction of the project, regardless of the quality or its completion. As an owner, insisting upon compliance with the plans and specifications, affiant became very unpopular with the Mortensens, and their continuous effort was to silence affiant in any way possible. They watched closely improvements which were made from the rent earnings, and when the time arrived that the continued improvements had reduced the cost of expenditures and operations to an amount that the project could carry and show a profit, the Mortensens stepped in and requested that a receiver be appointed on the grounds that the project was being mismanaged and the money dissipated, knowing full well that all that was needed was the elapse of a few months' time for comparison to show that the money expended in changes and improvements had been well and judiciously spent. All during the year of 1953 there had been a saving in operation, but the big saving showed in the months of October, November and December, as September had seen practically all of the needed changes completed on operation and, as has been stated, a saving of over $15,000.00 was effected.

That the Mortensens collected every cent of the commitment grant of $3,080,000.00, and they now come forward with an effort to gain complete con-

trol of the project; drain whatever more they are able to out of rents, and, most of all, remove affiant from the management and access to the books of account, in order that all their shortcomings as contractors and builders of Fairview Manor cannot be made a matter of public record.

That the Mortensens and Henderson shorted the project in excess of $1,000,000.00, as shown by the Cross-Complaint lodged herein, and now want to take over the interest of affiant by means of an instrument signed by affiant while extremely ill with a heart attack, and while he was taking medicine that dilated his eyes to a point where he was unable to read. That the man he trusted, Rushlight, in addition to having affiant sign away his rights to Fairview Development, Inc., also had him sign a demand note, payable to Rushlight, in the sum of $25,000.00, and did also have him sign an agreement to purchase the interest of Everett Nowell in Fairview Development, Inc.

It was evident to affiant when he had regained his strength to read and understand the nature and import of the documents prepared by the plaintiffs' attorneys and which was signed by affiant through the representations of Rushlight, that the plaintiffs had concocted a scheme to secure not only the profit on the contract of construction, but also over One Million ($1,000,000.00) Dollars by failing to do the work, and use the materials provided for in the plans and specifications, and then to secure the ownership of Fairview Manor so that they could

eliminate affiant, secure possession of the books and property and prevent an investigation of the illegal and fraudulent practices of the plaintiffs, as more fully set forth herein.

On page 2 of Everett Nowell's affidavit, last part of Paragraph 1, Nowell states: "However, the testimony showed certain activities by Cash Cole in relation to his management of Fairview Development, Inc., which was not for the benefit of Fairview Development, Inc., and of which your affiant had no knowledge prior thereto." This statement is untrue. There were three things brought out in the testimony. One was that purchases had been made through Fairview Manor for auto parts for Tom Cole. This procedure did not require a meeting of the Board of Directors, and it has been done at various other times—simply an accommodation to take advantage of securing wholesale prices for people who worked for, or were interested in, Fairview Development, Inc., and which has been paid.

Item 2, which was severely cricitized by Attorney Diamond, was the building of a bar by Everett Nowell for his apartment, along with all other furnishings that were charged to Fairview Manor, and the payment by Cash Cole as manager of Fairview Manor of $1,000.00 per month to Everett Nowell as his 50% share of the management agreement with Fairview Manor, although Nowell was, at the time, and almost continuously from the time he had received the $1,000.00 per month up until December, 1952, totalling in excess of $20,000.00, on the pay-

roll of Alaska Freight Lines, and used the apartment to house his numerous friends, some of whom occupied the apartment without pay for as long as two months at a time. Therefore, the affidavit of Nowell is untrue, and the things for which the criticism was charged were certainly of his knowledge, and without regard for the position in which it placed affiant, although affiant supported him loyally, feeling that he was a friend and close business associate.

On page 3, Paragraph 2 of Everett Nowell's affidavit, his statement that Nowell's attorneys represented Nowell and Cole up until the case was filed against affiant is not true. Affiant could never agree with Morrissey in the manner in which affiant was advised by his firm. There were interests of the corporation which affiant felt should be taken to Court, but there was never anything beyond conferences, with no results. When the time arrived for the transfer of the mortgage to the final mortgagee there were several liens against the project which stopped the transfer. In order to remedy this situation, Josef Diamond produced an agreement to release the final 10% payment which FHA requires by law shall be held in escrow until all bills are paid and the property is free and clear, and completed according to plans and specifications. Affiant objected to such procedure, because the project had not been completed according to plans and specifications and there were several liens against the project. Notwithstanding this situation,

affiant and associates were advised by Morrissey to sign the release, with the verbal understanding that the money would be held by the bank as part security for guarantee of a $470,000.00 total of liens, along with a note for the remaining amount being put up by the Mortensens. This was the only way the National Bank of Commerce could be relieved of the $3,080,000.00 loan before the Kansas City Title and Trust Company would guarantee the title. The penalty against the project for helping to clear the liens was a $6,000.00 charge by the agent of the Kansas City Title and Trust Company for his services for three days.

This transaction was completed about April 30, 1953, and within a few days affiant was informed by his auditor that the money had been released direct to the Mortensen Company, and further inquiry disclosed that in order to obtain the release of these funds, a clearance had to be made by Fairview Development, Inc., and the files of FHA show that upon a request made on FHA form by the National Bank of Commerce and signed by Cliff Mortensen as President of the corporation, the clearance had been given by FHA. Thus Fairview was left without any guarantee of the removal of the liens or the completion of the project according to plans and specifications.

It was during the trial that affiant heard Mr. Nowell's letter of condemnation of affiant read, and it then made clear to affiant that Nowell's responsibilities as a director in Bayview Realty and

Fairview Development, Inc., were secondary to his personal affairs, and had been from the beginning. From the time that Fairview Manor had a drop in the number of tenants to the point where he could not be paid $1,000.00 per month, he immediately made it clear that whatever he could do to get the most money from the project for the interest he held would be done, regardless of policy, friendship or anything else, and the course decided upon by Nowell and his attorneys gave no consideration at all to affiant.

Referring to page 4, Paragraph 2 of Nowell's affidavit, affiant fully appreciated, after recovering sufficiently from his illness to be able to read and digest the agreement which were made, that if the Fairview Development, Inc., was to remain solvent it would have to be done without any agreement from the Mortensens and Nowell, who clearly showed by his letter that he was going along with the Mortensens, and just marking time, with the aid of his attorneys to keep affiant from bringing any action against them. Affiant was never represented by Nowell's attorneys, nor was Fairview Development, Inc., to any advantage, although they collected $9,000.00, for which Fairview Development, Inc., has never received a statement.

In reference to page 4, Paragraph 3 of Nowell's affidavit, Nowell has not carried out the requirements and conditions of the contracts and the Stipulation dated October 9. Affiant has not received Nowell's stock in Fairview Manor, nor has

Nowell turned over the records of transactions which he and Kenneth J. Kadow (presently under investigation by the McCarthy Committee) handled for the sale of two houses for Bayview Realty, Inc. The only thing affiant has is a memorandum sheet of paper showing that Nowell and Kadow disposed of the houses for approximately $27,500.00. This shows a loss of $11,000.00 when subtracted from the bills outstanding against the operation, and affiant has never been able to secure any other information concerning the handling of over $30,000.00 other than being informed that the deal balanced out approximately even. Kadow was not a stockholder in Bayview Realty, nor was he a director in the company, and the same is true of West Juneau and Gastineau Utility. Kadow had no stock in either one of these companies. The statement that affiant has taken over the assets of Bayview Realty, Inc., and exercised them to his own designs and purposes is utterly false. There were no assets, but to the contrary, a very substantial loss. Nowell appropriated approximately $3,000.00 from cash belonging to Bayview Realty, Inc., and applied it on payment of a Cadillac automobile.

It is true that Tom Cole and Mrs. Cash Cole were elected to the Board of Directors of Fairview Development, Inc. When Nowell and the Mortensens withdrew as directors, as per the Stipulation, there was no legal way for Fairview Development, Inc.,

to function unless it elected additional persons to make up a Board of Directors.

Referring to page 5, Paragraph 1, which states that Nowell dismissed a case in excess of $690,000.00 for damages against the Mortensens, affiant gathered all the evidence upon which the case was based and attempted to have Nowell's attorneys file the case many months prior to when it was filed, but without avail. Suddenly, without the knowledge of affiant, or his consent, the case was filed and verified by Everett Nowell, only a short time before the hearing of affiant's case in Fairbanks. Affiant and Nowell had discussed the case, and affiant was of the opinion that it should not be filed at that time; that it would only create more dissension, and if there was a chance to settle, it should be attempted. It is affiant's conclusion that the case was filed by Everett Nowell solely for his own bargaining benefits.

Affiant was a director in the Gastineau Utility Company, Inc.; Bayview Realty, Inc., and Fairview Development, Inc., as was Everett Nowell, and wishes to state that at no time were his responsibilities as a director and officer of the above-named corporations considered paramount. His judgment and actions were for himself, regardless of the corporation or those in it. As President of Fairview Development, Inc., he knew full well the shortcomings of the Mortensens in the performance of their contract. That Cliff Mortensen signed any and all papers that he saw fit as President, and that Nowell, at no time, did anything to affirm his

right and duty as the President, notwithstanding the fact that affiant protested such procedure to him in front of his attorneys. Until the last, Cliff Mortensen signed his name as President of the corporation to the final paper releasing all of Fairview's security money for completion of the contract, yet Nowell, as the regularly elected President of the corporation, did nothing to nullify such action.

In conclusion, affiant wishes to state that, in spite of an average vacancy of 55 tenants per month for the past three months, a saving in operation has been effected, due to the improvements which have been made since the opening of the project until September, 1953, amounting to a sum in excess of $15,000.00. Each FHA payment, in the sum of $21,690.16, has been made on its due date. These payments include principal, interest, reserve for mortgage insurance, reserve for fire insurance, reserve for taxes, reserve for ground rent, and reserve for replacements. The only other bills are for salaries and operational expenses which are paid currently each month. In order to meet these bills on time, it has been found necessary to borrow $7,500.00 which will be paid May 30, 1954. All of the escrow money for the different items enumerated is paid directly by the trustee, the Seattle Trust and Savings Bank.

/s/ CASH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That in reply to the affidavit of Frank V. Henderson, filed herein, the statements in Paragraph 3 are untrue. Affiant was not consulted about the terms and conditions contained in the stipulation. That it is not true that Rushlight hinged the settlement of his case upon their settlement with Cash Cole. That Rushlight, under the guise of friendship, made an impossible settlement for affiant to

comply with, and it was intended as such, and that Rushlight was informed by Tom Cole that the payments agreed upon to be received by the Mortensens and Nowell could not be met the first of the year. That Nicholas Jaureguy did not work out the settlement. That the agreement, as worked out, secured for Rushlight $125,000.00, and for $1,000.00, which was not received by affiant; he was later informed by Rushlight's attorney, a Mr. Hardy in Portland, that affiant sold all interest in Bayview Realty Company, which, in turn, had acquired Mortensen's stock and Nowell's stock; and in addition to acquiring all of Bayview Realty, Inc., for the sum of $1,000.00, they secured affiant's signature on a promissory demand note from Fairview Development, Inc., for the further sum of $25,000.00. That Rushlight even agreed to the release to the Mortensens of an escrow sum of $8,800.00 for landscaping work on the grounds of Fairview Manor, which work has never been done. That consequently, affiant was to be left without a share of stock in either corporation, Bayview Realty, Inc., or Fairview Development, Inc.

In reference to Paragraph 4 of Henderson's affidavit, affiant acknowledges that he has been carrying on the business of Fairview Manor, but it has been done legally and in an organized manner. That Cliff Mortensen and Everett Nowell had withdrawn as directors and Tom Cole and Mrs. Cash Cole were appointed and elected in their place in order that the corporation would be legally qualified to carry

on business. Affiant has not permitted members of his family to occupy apartments other than in line with the work which they performed. The same salaries and procedure have been followed by affiant with members of his family as with other employees, i.e., people employed by the corporation have been paid a salary, plus their apartment. That tenants have not been unduly antagonized, with the exception of those violating rules and regulations. That a good deal of trouble was caused through the failure of the bookkeeper installed in the office of Fairview Manor by the Mortensen group to secure signatures on leases of over one hundred tenants. That insistence on signatures to these leases did cause some controversy.

Referring to Subsection E of Paragraph 4 of Henderson's affidavit, as affiant has already stated, there were no funds with which to pay the Mortensen group on the agreement negotiated by Rushlight. That the initial payment specified in the stipulation would have immediately thrown the project into bankruptcy, and affiant's course, as the manager and a director in Fairview Development, Inc., has been to pay all current bills, including labor, and to meet each monthly payment due the mortgagee. That the funds of the corporation are not being dissipated and squandered. That from the month of November, 1953, through the present date, Fairview Manor has averaged 55 vacancies, and that, notwithstanding this loss of income, every obligation has been met to date, and at the present

date, the only bill that Fairview Development, Inc., owes, other than those which are currently paid each month, is a note for $7,500.00. That this money was borrowed to meet the current bills and to cover part of the loss incurred by the vacancies. That the rest of the money, amounting to approximately $15,000.00 has been made up in a saving of labor and operational costs. That a preliminary comparison of the 1953 operational costs over those of 1952 amounts to something over $15,000.00, which figures are in contrast to the Mortensens' participation in the operation of the corporation by continuously harrassing the management in trying to maintain a normal operation of the project, notwithstanding the fact that the Mortensens, as the contractors and builders of the project had forced Fairview Manor to expend $141,000.00 in remedying the shortcomings of their work as contractors. That contrary to every statement and action on their part, Fairview Manor is still a corporation which has paid all of its legal and just debts to date.

That a Certified Public Accountant is presently working on the books of account of the corporation and will, within a reasonable length of time, have a full report for inspection by all concerned.

Affiant further states, in reply to the affidavit of Cliff Mortensen, on file herein, that the statement in Paragraph 1 of said affidavit are untrue. That Frank Henderson and Nelse Mortensen are not and have never been directors of Fairview Development,

Inc., as may be verified by the corporation's minute book. That there was not a deadlock in the conduct or management of the affairs of the corporation, due to the failure of the Board of Directors to proceed, nor do the books of the corporation show mismanagement or improper expenditure of funds and dissipation of the assets. That the directors and officers of Fairview Manor were Everett Nowell, President; Cliff Mortensen, Vice President, and Cash Cole, Secretary-Treasurer, who conducted the business of the corporation from its origin under a resolution passed by the Board of Directors, giving full power and authorization for Cash Cole to act as its business manager, and the same Board of Directors, all present, ratified a contract of management for Everett Nowell and Cash Cole. That each of the directors above named held a share of stock.

In reference to Paragraph 2 of the above-mentioned affidavit, affiant further states that an agreement was made that 900 shares of stock should be issued, 450 to the Mortensen group and 450 to Bayview Realty, Inc., and/or Cash Cole and Everett Nowell. Affiant and Nowell received their stock as full payment for furnishing the land and the temporary commitment for the project. The Mortensens were to receive their stock for fulfilling the terms of their agreement and completion of the contract according to the plans and specifications. This stock was placed in escrow, to be delivered as stated when the project was successfully completed;

and to date, the contract has not been completed, as set forth in the Cross-Complaint on file herein.

The statement that the Mortensens had 50% of the voting stock is untrue. Each director voted one share, and the continuous attempt of the Mortensens to insist that their 450 shares of escrow stock had voting rights was both untrue and illegal, as the Territorial law clearly defines how a Board of Directors shall vote. Bayview Realty, Inc., and/or Cash Cole and Everett Nowell have performed their part of the agreement fully and were entitled to the 450 shares of stock, yet the Mortensens, with their corps of attorneys, would never agree to release it, and, as cited, have never completed the contract. Mortensens' attorneys have kept the holder of the escrow stock from ever delivering said stock, thereby failing to perform their part of the agreement.

In reference to Paragraph 5 of the aforementioned affidavit, Cliff Mortensen cites the various liens still against Fairview Development, Inc., but during May, 1953, he signed an FHA request for the final payment of the sum of approximately $311,000.00 on the contract, made up by the National Bank of Commerce, as President of Fairview Development, Inc., in which it was stated that all bills incurred in the construction of Fairview Manor had been paid and that there were no liens against the property. Neither affiant nor Everett Nowell, as directors and owners of stock of Fairview Development, Inc., were responsible for any bills or

liens as a result of the Mortensen Company(s) operation as the contractor. The Mortensen Company collected $3,080,000.00. Attached hereto, and marked Exhibit "A," is a letter of instruction from Josef Diamond, Mortensens' attorney, to their auditor, showing that they knew very well what the financial transactions of the corporation were. The auditor was also instructed by the Mortensens to alter his method of figuring depreciation, and instructed him to keep the books in such a manner that the amount in excess of $100,000.00 which had been spent primarily for capital improvements, would appear on the books as having been spent for maintenance, maintenance materials and labor, thus placing the management in the light of having spent large sums of money for labor and materials in the routine operation of the project. At present a C.P.A. is auditing the books of the corporation and has found so many errors at variance with the true facts that he has found it necessary to make an amended report for the Bureau of Internal Revenue. These errors were made by the auditor hired by the Mortensens, and the bookkeeper hired by them for the project was found to be in default of approximately $2,700.00 in September, 1953.

Mr. Jaureguy, who represented affiant, did not make the settlement, but advised affiant before he left Fairbanks that it had been done upon the advice of Mr. Cake to Dick Rushlight and that Cake had also advised Rushlight to get possession of

Fairview Manor without fail. It is true that affiant agreed to buy, but under no such conditions as agreed to by Rushlight. After the Mortensens had gotten all possible cash from the corporation, they have endeavored to cover up their shortcomings in the performance of the contract by claiming that the management had dissipated the funds of the corporation, and requested a receiver. Apparently, this was to be accomplished by the acquisition by Rushlight of all of the stock of Fairview Development, Inc., thus precluding affiant from any further actions as a director or stockholder of the corporation and preventing affiant from bringing the Mortensens to justice for their lack of performance of the contract agreement, although the full contract price had been obtained by the fact that Cliff Mortensen forged his name as president of the corporation and swore that all bills had been paid and the job had been completed according to the contract and specifications.

/s/ CASH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

EXHIBIT A

(Copy)

Law Offices
Lycette, Diamond & Sylvester
Eighth Floor Hoge Bldg.
Seattle 4

John P. Lycette
Josef Diamond
John N. Sylvester
Herman Howe
Earle W. Zinn

Mr. Herbert F. Lofquist,
Exchange Building,
Seattle 4, Washington.

Re: Fairview Development, Inc.

Dear Herb:

You will find enclosed copy of special combined meeting of stockholders and directors of Fairview Development, Inc., held on June 11 and 12, 1951. The enclosed minutes are correct and accurate, though they have not been signed by all of those present. The minutes are nevertheless true and correct minutes of the corporation.

You will note that in the minutes there is a provision that your office at Fairbanks, Alaska, will take certain action in connection with the rental of the apartments. Please be sure this procedure is put into effect and that you keep accurate accounts and records of the receipts and expenditures for the operation of the Fairview Manor. If you

will obtain the necessary corporate resolutions required by the bank at Fairbanks to permit the signing, endorsing and depositing of checks by you or your agent or employee located in Fairbanks, and forward them to us, we will see that they are properly executed. Please also discuss with Cash Cole and/or Cliff Mortensen the necessity of bonding your agent or employee who will be given the authority to handle the funds of the corporations. No bills or obligations of the corporation should be paid without approval and authority of an officer of the corporation.

You will also notice that you are required to charge pro rata insurance costs, taxes, interest and other expenses chargeable to the apartments taken over by the corporation, as well as all other proper expenses.

There are other matters included in the minutes which should also be incorporated in the books and records of the corporation. If you have any questions, please get in touch with us or with Cliff Mortensen or Cash Cole.

Yours very truly,

LYCETTE, DIAMOND & SYLVESTER,

/s/ JOE DIAMOND.

JD/M.

cc: Cliff Mortensen.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN CONNECTION WITH MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

State of Oregon,
County of Multnomah—ss.

W. A. Rushlight, being first duly sworn, upon his oath deposes and says:

That he is alleged to have acted in concert with the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and to have entered into a conspiracy to defraud defendant Cash Cole and is further alleged to have practiced fraudulent and deceptive practices upon him in connection with this case and makes this affidavit for the purpose of refuting these statements made in the defendants' motion to set aside and vacate the stipulation and judgment and in the affidavits of Cash Cole and Tom Cole attached to said motion.

That on the evening of October 5, 1953, your affiant was advised that Cash Cole had suffered a heart attack and that it would be impossible to continue with the trial which had been in progress in the above-entitled case. On the morning of October 6th the attorneys for the respective parties secured a recess of said trial for a period of two days until October 8th. Your affiant and Mr. Nicholas Jaureguy, the attorney for Cash Cole, were convinced, because of said physical condition,

that it would be for the best interests of Cash Cole to sell his interest in Fairview Development, Inc., to the Mortensens; and also because of statements theretofore made by Cole they believed that such sale would be desired by him. Accordingly, during the course of that day negotiations were carried on by your affiant and Mr. Jaureguy on behalf of Cash Cole and also by Everett Nowell and his attorney, John Hedrick, with the plaintiffs, seeking an offer from them to purchase all of the interest of Cash Cole and Everett Nowell in said project. Cole and Nowell owned the stock of a corporation which itself owned one-half of the stock of Fairview Development, Inc. A proposal was on that day secured from the plaintiffs to purchase said stock, said proposal being substantially the same as the agreement ultimately entered into, except that in the final stipulation the situation was reversed, that is, the sale was from Cole and Nowell to the plaintiffs instead of from the plaintiffs to Cole and Nowell. However, on Tuesday evening, October 6, or early the next morning, or both, Cash Cole advised affiant that he would not sell. Theretofore we had had many conversations about the possibilities either of selling or of buying; and after telling me that he would not sell, we again discussed the possibility of buying from the plaintiffs.

Accordingly, negotiations were begun on Wednesday, October 7, in an endeavor to arrive at an agreement with the plaintiffs whereby Cole would buy the interest of the plaintiffs; and thereby the

parties would settle the lawsuit. In connection with these same negotiations, it was found desirable, probably absolutely necessary, that the interest of Everett Nowell be also purchased. Accordingly, the negotiations with the plaintiffs were accompanied by negotiations with Nowell, both proceeding through Wednesday and Thursday, October 6 and 7. By noon of Thursday, October 7, it was believed that an oral agreement had been arrived at with both the plaintiffs and with Nowell for the purchase of their interests in Fairview Development, Inc.

On Thursday morning the court continued the case until 2:00 o'clock so that further negotiations could be had. At 2:00 o'clock plaintiffs' attorney asked the court to appoint a receiver. That motion was granted and a receiver was appointed. Both Cash Cole and I and also Cole's attorney believed that with the appointment of the receiver it became all the more important that, if Cole did not care to sell, he should buy.

Your affiant kept Cole advised of the negotiations but we did not enter into any extended discussions because of his physical condition. However on Friday morning, October 9, when the proposed stipulation had been reduced to writing in its entirety, Mr. Jaureguy and your affiant went to Cole's bedroom and there explained all the provisions of the stipulation. The more important provisions were read to him in full and the rest were fully ex-

plained. He and his wife, Ruth Cole, agreed to all the terms thereof and signed it.

In the meantime, the plaintiffs, when they were advised that the Coles had signed the stipulation, said they would insist upon a modification. This modification was that certain payments to be made by Fairview Development, Inc., should be made quarter-annually instead of annually as theretofore provided in the stipulation. We strenuously argued that such change should not be made, but the plaintiffs insisted upon it. We thereupon returned to the Coles' apartment and explained this change to them. They both readily agreed to it, and initialed the changes in the stipulation.

I caused a corporation in which I own the majority of the stock to pay to the plaintiffs $1,000.00, to pay to Nowell $1,000.00, and to pay to Nowell's attorney, John Hedrick the sum of $5,000.00, all of which were required in connection with such stipulation. I also caused said corporation to guarantee to Nowell the payment of the last $20,000.00 of a total of $44,000.00 to be paid to him as the purchase price of his interest in the corporation controlled by him and Cole and which owned one-half the stock of Fairview Development, Inc.

Your affiant obtained from Nowell an assignment from him to Cole of his interest in said corporation, and obtained from Cole an assignment to your affiant of his interest therein. The agreement between Cole and your affiant, not, however, reduced

to writing, was that your affiant would cause to be paid all sums of money necessary to effect said transfer of the stock, also guarantee said $20,000 to Nowell, and that Cole should receive a management contract for the management of Fairview Manor. The $5,000.00 paid to John Hedrick was in payment of an assignment from him to a corporation controlled by your affiant of his claim against Fairview Development, Inc., for attorneys' fees, and said sum was to be repaid to your affiant's corporation by said Fairview Development, Inc.

That all of the statements contained in the motion and the accompanying affidavits of Cash Cole and Tom Cole to the effect that this affiant was engaged in a conspiracy with plaintiffs or any of them are completely and utterly untrue. Contrary to the statements contained in the affidavits of Cash Cole and Tom Cole and in the motion, not only was Cash Cole fully aware of what was going on, but understood each and every matter contained in said stipulation and all ancillary matters. One of the principal reasons for the present financial condition of Fairview Manor is the inefficient management and the numerous family members on the payroll.

Your affiant further states that at no time did Ruth Cole, Cash Cole, the doctor or Tom Cole advise or request him to refrain from seeing Cash Cole or discussing these matters with him.

/s/ W. A. RUSHLIGHT.

Subscribed and sworn to before me this 20th day of February, 1954.

[Seal] /s/ DENTON G. BURDICK, JR.,
Notary Public for Oregon.

My commission expires 10/29/54.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Allene Hendricks, being first duly sworn, upon oath deposes and says:

That she is bookkeeper for Fairview Manor, an apartment house project of Fairview Development, Inc., and is familiar with the books of account of Fairview Manor from the time of the opening of same.

That she has checked the operation figures since the opening date, especially in regard to the amounts expended on improvements and corrections of the contractor's mistakes, omissions and poor

workmanship. That the sums expended in this regard have had a very beneficial effect in reducing the monthly over-all operating expenses.

That she made up a comparative statement for the years of 1952 and 1953 which shows a saving in 1953 of $15,354.89 over 1952.

/s/ ALLENE HENDRICKS.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

State of Washington,
County of King—ss.

The undersigned, Everett Nowell, being first duly sworn upon oath deposes and says:

That he has read the Affidavit of Cash Cole, subscribed and sworn to on the 26th day of February, 1954, and filed in the above-entitled cause; that the statement of Cash Cole contained therein that Hedrick and Morrissey did, at the instance of Everett Nowell, institute an action against Mortensen and Henderson in the United States District Court at Seattle, Washington, that Cash Cole was opposed to bringing said action in Seattle and felt that the proper place to bring such an action against the Mortensens and Henderson was in Alaska where the property is located, is untrue; that prior to bringing such action a conference was held in the law offices of Morrissey, Hedrick, Roberts & Dunham, at 1404 Vance Building, Seattle, Washington, and at such meeting, Cash Cole, in agreement with your affiant Everett Nowell, specifically ordered the attorneys, Morrissey Hedrick, Roberts & Dunham, to draft such complaint, serve it upon the Mortensens and Hendersons and file it in the United States District Court for the Western District of Washington.

That the activities referred to by your affiant in an Affidavit previously filed herein, which were performed by Cash Cole and were not for the benefit of Fairview Development, Inc., and of which your affiant had no knowledge prior thereto refers to, among other things, money of the corporation which was used for the benefit of Tom Cole and his truck, money used to send a daughter-in-law of Cash Cole, by airplane to Kansas City, Missouri, exorbitant

amounts of money amounting to thousands of dollars used by Cash Cole for telephone calls, vacations taken by Cash Cole in which he spent Fairview money and others which are all in the records of this matter.

The law firm of Morrissey, Hedrick, Roberts & Dunham, at all times represented Everett Nowell, your affiant, as well as Cash Cole. Cash Cole, from time to time, was dissastisfied with certain decisions when someone disagreed with him and brought in other attorneys, but Morrissey, Hedrick, Roberts & Dunham represented Cash Cole during all the controversies concerning Fairview Development, Inc. As a matter of fact, as of this date, Cash Cole has not discharged said attorneys, nor has he paid them a balance of an attorney fee due to them by him, in the amount of Seven Hundred Fifty ($750.00) Dollars.

It has never been true that your affiant's responsibilities as a director in Bayview Realty and Fairview Development, Inc., were secondary to his personal affairs and Cash Cole in making that statement is not telling the truth. Your affiant has never gone along with the Mortensens' interests and has taken every step possible to protect Fairview Development, Inc., and the interests of Cash Cole and Everett Nowell.

Cash Cole states in his Affidavit that he has not received Nowell's stock in Fairview Manor. This allegation of Cash Cole is deliberately misleading

for Cash Cole knows that both he, Cash Cole, and your affiant, Everett Nowell, did not personally own or hold any stock in Fairview Development, Inc., but that they owned the controlling interest of Bayview Realty, Inc., and that Bayview Realty, Inc., owned and held one-half of the stock of Fairview Development, Inc., and that Everett Nowell, in compliance with the agreements entered into, transferred the stock owned by him of Bayview Realty, Inc., to Cash Cole and fully complied with all of the covenants and requirements of the various contracts entered into between Cash Cole and Everett Nowell. That Cash Cole has had all of the minutes and books of Bayview Realty, Inc., and your affiant, Everett Nowell, had none of them. Therefore, Everett Nowell had no memorandum to turn over to Cash Cole. The Statement that your affiant, Everett Nowell, appropriated approximately three thousand ($3,000.00) dollars from cash belonging to Bayview Realty, Inc., and applied it on the payment of a Cadillac automobile is deliberately misleading, in that Kenneth Kadow loaned and your affiant, Everett Nowell contributed the sum of ten thousand ($10,000.00) dollars each, or a total of twenty thousand ($20,000.00) dollars to Bayview Realty, Inc., Cash Cole, at no time, has contributed or loaned any money to Bayview Realty, Inc. The using of the money to buy an automobile for the company was done in the ordinary course of business and with permission of the interested parties.

Cash Cole does not tell the truth when he states that the damage suit against the Mortensens was

suddenly, and without his knowledge or consent, filed and verified by Everett Nowell, for the reason that as stated heretofore, Cash Cole was well aware of all of the events concerning that particular lawsuit, instructed the attorneys to draft it and instructed Everett Nowell to verify the complaint so that it could be filed. Cash Cole at no time expressed the opinion that it would be brought in the Territory of Alaska.

That your affiant, Everett Nowell, repeatedly took action to stop Cliff Mortensen from signing any papers as president of Fairview Development, Inc., and any statement of Cash Cole to the contrary is not true.

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 3rd day of March, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 6, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULAION AND JUDGMEN BASED THEREON

The undersigned, Cliff Mortensen, and Frank V. Henderson, being first duly sworn upon oath depose and say as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, and in opposition to the supporting Supplemental Affidavits to said motion executed by Cash Cole and Tom Cole:

1. With reference to Page I of the Affidavit of Cash Cole, dated February 26, 1954, that there was a deadlock in the management of the properties of Fairview Development, Inc., as set forth in detail in the affidavits heretofore filed herein by Plaintiffs; that as set forth in said Affidavits, there has been mismanagement of the properties of the Corporation and improper disposition of the funds and assets thereof, all as further evidenced by the testimony of Cash Cole heretofore given in this cause.

2. With reference to Page 2 of said Affidavit of Cash Cole, that the Plaintiffs herein misappropriated no funds in connection with the construction of Fairview Manor, nor did the Plaintiffs draw any funds in connection with said construction to which they were not entitled, nor were any such draws made which were not agreed to by Cash Cole; that the construction at Fairview Manor was completed

in accordance with the plans and specifications and was inspected and approved by the Federal Housing Administration; that no funds were expended by Defendant or by Fairview Development, Inc., by reason of either unworkmanlike construction, the use of inferior materials in construction, or the failure to complete construction; that while Cash Cole has from time to time complained of construction deficiencies, on analysis, such claims of deficiencies involved not inadequacies of construction (which construction was FHA inspected and approved) but rather involved alleged inadequacy of plans and specifications, which were prepared by the Architect of Cash Cole's choice.

3. With reference to Pages 3 and 4 of said Affidavit of Cash Cole, that the intention of Plaintiffs has never been other than to complete the construction of Fairview Manor in accordance with the Plans and Specifications and in a workmanlike manner and to attempt to secure proper management of the properties of Fairview Development, Inc., to the end that all of the Stockholders thereof would realize a reasonable profit from the operation of said properties; that the sole reasons that Plaintiffs sought the appointment of a Receiver to manage the properties of the Plaintiff Corporation, was to secure the competent operation and management of Fairview Manor for the benefit of all of the Stockholders of the Plaintiff Corporation and to prevent the property and assets of the Plaintiff Corporation from being dissipated and lost by reason of the un-

lawful and unauthorized acts and actions of Cash Cole; that pursuant to such intentions the Plaintiffs brought suit against Cash Cole in settlement of which Cash Cole executed the stipulation which he is now attempting to repudiate; that in reaching said settlement the Plaintiffs at no time acted in consort with A. G. Rushlight, his agents or representatives, nor Everett Nowell, his agents or representatives, but rather throughout all negotiations leading to said settlement, the interest of the Plaintiffs herein remained antagonistic to those of said A. G. Rushlight and said Everett Nowell.

4. With reference to Page 5 of said Affidavit of Cash Cole, that Cash Cole's sworn testimony given in this cause, speaks for itself on the subject of the many instances of mismanagement and misappropriation of the funds of the Plaintiff Corporation.

5. With respect to Page 6 of said Affidavit of Cash Cole, that the construction of Fairview Manor was completed in accordance with the Plans and Specifications; that the funds disbursed to the Plaintiffs herein were only those to which they were lawfully entitled; that Cash Cole was fully familiar with the disbursements made and agreed thereto; that there were liens filed by certain Sub-Contractors in connection with the construction of Fairview Manor, for work performed beyond that which was called for by the Plans and Specifications; that to protect Fairview Development, Inc., against foreclosure of said liens, Plaintiffs deposited in escrow

the full amount of cash necessary to cover said liens, that all of the said transactions were well known to and agreed to by Cash Cole and his then Attorneys; that Nelse Mortensen-Alaska Company has paid huge sums of money to Sub-Contractors for work performed beyond that called for by the Plans and Specifications without ever having received any payment therefore from Fairview Development, Inc.

6. With respect to statements made concerning Everett Nowell on page 7 of said Affidavit of Cash Cole, that the record in this cause will show that said statements are completely inconsistent with the sworn testimony of Cash Cole.

7. With reference to the Supplemental Affidavit of Cash Cole, dated February 26, 1953, that the statements made in said Affidavit, insofar as said statements are inconsistent with Affiant's Affidavits heretofore filed herein, are untrue; Affiants reaffirmed their said Affidavits as setting forth the true facts and deny that the facts are as stated in said Supplemental Affidavit of Cash Cole.

8. With reference to the Affidavit of Tom Cole, dated February 26, 1954, that as it appears on the face of said Affidavit that Tom Cole was not connected with Fairview Development, Inc., prior to April, 1953, in consequence of which it follows that Tom Cole can have no personal knowledge of the construction of Fairview Manor nor the financing thereof; that insofar as the Affidavit of Tom Cole purports to state facts involving Fairview Develop-

ment, Inc., which occurred prior to April, 1953, said Affidavit is untrue and merely reflects the self-serving statements made by Cash Cole to Tom Cole.

9. That Tom Cole was present and actively participated in the various negotiations leading up to the settlement; that as conceded in said Affidavit of Tom Cole, Tom Cole read and was thoroughly conversant with the stipulation which was later executed by Cash Cole and filed herein on October 9th, 1953; that the Affidavit of Tom Cole is inconsistent in that it states in Paragraph 2, Page 4, "Affiant further states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument signed by Cash Cole * * *" while in Paragraph 2, on Page 2, the following statements appear "* * * and Affiant advised Dick Rushlight after the negotiations were completed that it was an utter impossibility to purchase Mortensen's, Henderson's and Nowell's stock on the terms set forth in the Agreements * * *" "Affiant also informed Mr. Jaureguy, one of Cash Cole's Attorneys, that the terms of the Agreement were impossible of fulfillment * * *"

10. That the stipulation did not provide that the stock of Fairview Development, Inc., be turned over to Cash Cole, but in fact provides as follows: "It is understood and agreed that said obligation in the sum of $89,000.00 shall be secured by Cash Cole; Everett Nowell; and/or Bayview Realty, Inc., placing in escrow all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares by this Agree-

ment purchased by said persons and 450 shares of said capital stock owned by Bayview Realty, Inc."

That the said Affidavits of Cash Cole and Tom Cole imply that the stipulation and judgment based thereon are unconscionable and confiscatory for the reason that there were not sufficient funds in the corporation to purchase the interests of the holders of 75% of the stock. In other words Cash Cole seems to be contending that, to be equitable, the stipulation which he signed should require only a disbursement of corporate funds to vest title to all of the corporation in him. This position is patently ridiculous and it was never within the contemplation of the parties that the funds to be paid by Cash Cole to obtain full control and ownership of the corporation would be paid solely out of income derived by Fairview Development, Inc.

That the matters raised in the said Affidavits of Cash Cole and Tom Cole were all the subject of litigation pending at the time the stipulation filed herein was executed; that said stipulation specifically recognized the existence of this pending litigation and was intended by all parties to finally dispose of it; that said stipulation is in all respects fair and equitable and was executed in good faith after prolonged negotiation and careful consideration by all parties and attorneys.

Dated at Seattle, Washington, this 5th day of March, 1954.

/s/ NELSE MORTENSEN,

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 5th day of March, 1954.

[Seal] /s/ J. E. SWANSON, JR.,
Notary Public for the County of King, State of Washington,

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1954.

[Title of District Court and Cause.]

AMENDED MOTION FOR APPOINTMENT OF RECEIVER

Now Come the plaintiffs, in the above-entitled cause, jointly and severally, Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, and pursuant to leave of court first duly had and obtained, file this amended motion for appointment of receiver and do hereby state as follows:

a. That the principal defendants, Cash Cole and Bayview Realty, Inc., a corporation, or either of them, are collecting the rents and profits from the Fairview Manor apartments; that there are 272 such

apartments; that the gross collections from said apartments will approximate from $31,000.00 to $33,000.00 a month; that if a receiver is not appointed to make said collections, and damages result from loss of said rents and profits or any part thereof to the plaintiffs herein, said defendants will not be able to respond in damages.

b. That the property or the rents or profits therefrom and involved in this cause are in danger of being lost or materially injured or impaired, and said property and said rents and profits which are the subject of this action are now claimed by the plaintiffs herein as heretofore more fully set out in the pleadings and proceedings filed and taken in this cause, and a receiver should be appointed in accordance with the provisions of the general laws of the Territory of Alaska (A.C.L.A., 1949, 55-6-91).

c. That a receiver should be appointed to dispose of the property involved in this cause according to the final judgment entered herein as provided under the general laws of the Territory of Alaska (A.C. L.A., 1949, 55-6-91).

d. That the acts and actions of said defendant, Cash Cole, and his agents and representatives have operated to the detriment, loss and damage of the corporate and individual plaintiffs resulting in irreparable injury and damage to the property and assets of said plaintiff corporation and to the security and property of the individual plaintiffs.

e. That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of the unlawful and unauthorized acts and actions of the defendant, Cash Cole, or the Bayview Realty, Inc., or their agents and representatives.

f. That a receiver should be appointed for the purpose of protecting and preserving the property and assets of said plaintiff corporation and the interests thereof, and the interests of all of the stockholders of said corporation, including the individual plaintiffs.

Now Therefore, said plaintiffs do hereby move as follows:

1. That the court appoint a disinterested party as receiver, or reinstate Robert E. Sheldon, formerly acting as receiver in this case, to take over the management and operation of Fairview Manor Apartments at Fairbanks, Alaska, involved in this cause, until the pending motion of said Cash Cole and Bayview Realty, Inc., to set aside the stipulation filed herein on October 9, 1953, and the final decree based thereon, entered October 10, 1953, have been heard and disposed, and said defendants have complied with the terms and provisions of said final decree and the said stipulation, to collect all income therefrom and make all disbursements for current operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

2. That said receiver upon qualifying be authorized and instructed to take immediate possession of

Fairview Manor Apartments and all other property of the plaintiff corporation, Fairview Development, Inc.; to collect and preserve the rents, issues and profits thereof; and that he have the general powers of receivers in such cases as well as such special powers as this court may grant to him from time to time; and that any party or parties who are or may come into possession of any portion or portions of said Fairview Manor Apartments attorn to said receiver and pay him rental for the use and occupancy of such portion or portions.

3. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor Apartments, or any other matter relating to said project, or to the affairs of said corporation, and that said defendants and each of them be directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver until further order of this court.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by

plaintiffs in opposition to motion of said Cash Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein, including the affidavits filed in support of the motion and amended motion for appointment of receiver.

Dated at Fairbanks, Alaska, this 19th day of March, 1954.

JOE DIAMOND and
EARLE ZINN,

COLLINS AND CLASBY,

By /s/ WALTER SCZUDLO,
Of Counsel for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT BY EVERETT NOWELL IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER

State of Washington,
County of King—ss.

Everett Nowell being first placed under oath deposes and says:

That he was one of the incorporators of Bayview Realty, Inc., an Alaska corporation, and was a stockholder and director of this corporation and held the

office of President until he released his interest in said corporation to Cash Cole at the time that the Stipulation settling the above-named lawsuit was entered into herein. That Bayview Realty, Inc., has no physical assets of any type, that the only asset of Bayview Realty, Inc., is four hundred fifty shares (450) shares of common stock of Fairview Development, Inc., an Alaska corporation; that shortly after the organization of Bayview Realty, Inc., your affiant, Everett Nowell, Cash Cole and Kenneth Kadow, all of Alaska, agreed that each would make a loan of ten thousand ($10,000) dollars to Bayview Realty, Inc., so that it could carry out its functions as a corporation. Kenneth Kadow and your affiant advanced twenty thousand ($20,000) dollars to Bayview Realty, Inc., in other words, ten thousand ($10,000) dollars each. Your affiant and Kenneth Kadow then asked Cash Cole to advance ten thousand ($10,000) dollars as he had previously agreed. Cash Cole replied that he was without funds and was unable to supply the money that he had heretofore agreed to loan the corporation.

That your affiant, Everett Nowell and Cash Cole were both directors and officers of Fairview Development, Inc., one of the plaintiffs herein, that for a period of time each were receiving the sum of one thousand ($1,000) dollars per month as salary for services performed, paid by Fairview Development, Inc. The affairs of Fairview Development, Inc., developed to such an extent that it was necessary to make all possible savings and expenditures, there-

fore, as of December 1, 1952, your affiant, Everett Nowell, took himself off of the payroll and from that time on did not receive one thousand ($1,000) dollars per month. At this time, your affiant discussed this matter with Cash Cole as to whether he would take himself off of the payroll and not receive one thousand ($1,000.00) dollars per month henceforth. Cash Cole told your affiant that he had no other income, he had no assets, except his interest in Fairview Development, Inc., and Bayview Realty, Inc., and West Juneau, Inc., and Gastineau Utilities, Inc., all of which are Alaska corporations, and that if he did not receive this one thousand ($1,000) dollars per month, he would have nothing to live on and he could not support himself and his wife as he had no other income and no other assets, and that it was essential for his existence to receive the said one thousand ($1,000) dollars per month.

Further your affiant sayeth not!

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 16th day of March, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

My commission expires December 1, 1955.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF CLIFF MORTENSEN IN SUPPORT OF AMENDED MOTION FOR APPOINTMENT OF RECEIVER

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath, deposes and says:

That he is one of the plantiffs above named and prior to the Stipulation and Decree based thereon made and entered herein in October of 1953, was a Director of Fairview Development, Inc. That at said time he was a stockholder of Fairview Development, Inc., and still is a stockholder in said corporation subject only to the agreement relating to the sale of his stock contained in the said Stipulation entered into as a part of the settlement consummated in the above-entitled action in October, 1953, as aforesaid.

That he makes this affidavit in support of the amended motion of the plaintiffs above named for the appointment of a receiver of Fairview Development, Inc., a corporation.

That affiant hereby refers to affiant's prior affidavit filed herein on February 13, 1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Frank V. Henderson filed herein on February 13,

1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Joe Diamond and Earle Zinn filed herein on February 13, 1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Everett Nowell filed herein on the 13th day of February, 1954, and the 3rd day of March, 1954, likewise in opposition to the said motion to set aside the Stipulation and Judgment based thereon, to the affidavit of W. A. Rushlight filed herein on February 26, 1954, and to the supplemental affidavits of Cliff Mortensen and Frank V. Henderson filed herein on March 9, 1954, and by this reference makes said affidavits and each and every one of them a part of this affidavit, and having read the same and being fully familiar with their contents, reaffirms the facts therein stated as fully as if set forth at length herein.

That the defendants Cash Cole and Bayview Realty, Inc., are presently in possession of Fairview Manor, an apartment house situated in Fairbanks, Alaska, owned by Fairview Development, Inc., and are collecting the rents and profits thereof without accounting to the plaintiffs, and that said plaintiffs and affiant have no access to the premises or to the rents and profits nor to the books and records of the said Fairview Manor.

That substantial amounts of moneys are going through the hands of the defendants Cash Cole and Bayview Realty, Inc., each month, through the

collection of rentals of the apartments in said project, the collection of rentals from the garages in connection therewith and from the collection of the miscellaneous income from said project such as fees collected from the tenants for use of the laundry facilities, vacuum cleaners, etc.

That when said project first became occupied, the rental schedules for the units therein were as follows: 56 units at $115.00 per month; 168 units at $140.00 per month and 48 units at $155.00 per month. That the total income from the rental of the apartments alone in said project, assuming full occupancy, would thus be $37,400.00 per month or $448,800.00 per year if the rentals being charged in said project are still the same as those rentals originally established. That affiant is informed and believes and therefore alleges that since the inception of said project the monthly rentals from said project have been increased and that accordingly the monthly income received from the rental of the apartments in said buildings would be in excess of the amounts stated if said project is fully occupied.

That in addition to the rental income from rental of the apartments in said project, there are 132 garages which, if all rented, produce an income of $5 per month for 4 months of the year and $20 per month each for 8 months of the year, making total rental income from garages being handled by the defendants in the amount of $23,760.00.

That according to financial statement of Fairview Development, Inc., for the 12 months ended December 31, 1952, the corporation had income as follows:

Apartments	$432,186.39
Garages	19,853.70
Miscellaneous income	6,694.55

making a total income from said sources for the 12-month period of $458,734.64. That despite such fact, due to the mismanagement of the defendants, the corporation sustained a net loss during that period of $56,340.73.

That affiant does not have access to current financial statements for the said project, but has every reason to believe that the income being collected from said project by the defendants Cash Cole and Bayview Realty, Inc., and for which said defendants are failing to account, is substantially the same as that indicated by the operations for the year 1952, to wit approximately $458,734.64 per annum or $38,227.88 per month.

That the defendants Cash Cole and Bayview Realty, Inc., are not financially able to respond in damages for any such sums belonging to the corporation which they are collecting and for which they are failing to account to the plaintiffs herein. That affiant is informed and believes and therefore alleges that the defendant Cash Cole has no other income than moneys he receives from Fairview Development, Inc. That as of October, 1953, the said defendant Cash Cole was drawing $1,000 per month as a manager's salary from Fairview Development,

Inc., and was providing himself with an apartment rent-free. That from the time that affiant first became interested in Fairview Development, Inc., which was in 1950, the defendant Cash Cole has always professed to be in need of funds and repeatedly insisted upon being reimbursed immediately for all traveling expenses or expenses incurred on behalf of the corporation assigning as his reason for such urgency that "he needed the money."

That unless a temporary receiver is appointed for the project known as Fairview Manor owned by Fairview Development, Inc., pending a hearing on the merits on the motion to set aside the Stipulation and Judgment entered into in October of 1953, an irreparable injury will result to the corporation and to affiant and that the defendant Cash Cole and defendant Bayview Realty, Inc., are not able to respond in damages to the extent of such injury or any substantial part thereof.

Further affiant sayeth not.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 19th day of March, 1954.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR APPOINTMENT OF RECEIVER, AND IN SUPPORT OF MOTION TO VACATE STIPULATION AND JUDGMENT

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he makes this affidavit in opposition to the original and supplemental affidavits of Cliff Mortensen, Frank V. Henderson, Everett Nowell, A. W. Rushlight, Diamond and Zim, in opposition to the Motion to Vacate Stipulation and Judgment based thereon, and in support of plaintiffs' Motion for Appointment of Receiver of Fairview Manor.

That in opposition to the original and supplemental affidavit of Everett Nowell, affiant states that in September, 1949, Bayview Realty, Inc., was incorporated under the laws of Alaska, by Everett Nowell, Ruth M. Cole and affiant. That Everett Nowell was elected President; affiant, Secretary-Treasurer and Ruth M. Cole, Vice-President. Affiant was, by resolution, given full authority to act in all business matters concerning the corporation. That affiant also owned 25% of the stock of West Juneau, Inc. That affiant and Nowell, and the other owners of West Juneau, Inc., transferred

100 lots of West Juneau, Inc., to Bayview Realty, Inc. The purpose of this transfer of lots was to carry out a building project which had been promoted by Kenneth Kadow, who was then a Special Agent of the Department of the Interior for the promotion of housing in Alaska.

A contractor had been secured and four houses, known as the "lock-wall" type, were prefabricated for immediate erection.

Everett Nowell placed $10,000.00 in Bayview Realty, Inc., and Kadow placed the same amount to the credit of Bayview Realty, Inc., and received a note for the same, with the understanding that the amount would be credited on the purchase price of one of the houses to be built by Bayview. Two of the houses Kadow took to Fairbanks and erected on Alaska Railroad land. The other two houses were erected on lots furnished by Bayview.

Affiant installed a water system at West Juneau, furnishing all labor for the installation of mains from the reservoir to the project.

In the meantime, affiant had been negotiating with the City of Fairbanks for a lease on city ground for a large housing project, and after considerable time and expense, secured a 75-year lease on the ground. Then affiant began negotiations for a commitment from the FHA in Juneau, which was finally granted.

Affiant then incorporated Fairview Development, Inc., with Everett Nowell as President, affiant as

Secretary-Treasurer and Cliff Mortensen as Vice-President. Upon the incorporation of Fairview Development, Inc., the lease of the City of Fairbanks land was put in the name of that corporation.

Upon the completion of that phase of the project, affiant went to Seattle to complete arrangements with the contractors, Nelse Mortensen-Alaska Company.

In taking care of the above-mentioned business up to and including the closing of Fairview Development, Inc., affiant has spent over $10,000.00 and devoted 15 months of his time without any compensation.

The statement contained in Nowell's affidavit that Kadow had loaned Bayview Realty, Inc., $10,000.00 is not true. Although Kadow did want to become a stockholder in Bayview, affiant objected, as Kadow was an agent of the United States and affiant did not believe that he could legally be connected with anyone in the housing business.

Upon affiant's departure in 1950, Nowell made some arrangements without my knowledge or consent, which gave Kadow full authority to act in any manner he saw fit in transacting business of West Juneau, Inc., Gastineau Utility, Inc., and Bayview Realty, Inc. The 100 lots which had been conveyed were apparently reconveyed to West Juneau, Inc.

The four houses purchased were sold, and a number of lots were sold to the Alaska Housing Author-

ity for $16,000.00. Money was secured from the Territory for road building and all of this business was transacted by Kadow, who styled himself as "General Manager" of West Juneau, Inc.

At this time, affiant was Secretary-Treasurer of West Juneau, Inc., and remained such officer until October, 1953, but during all that time had never seen an accounting, and when affiant attempted to draw a check on the company bank account in the sum of $400.00 to pay the company's taxes for 1952, the said check was dishonored at the bank, as the signature was not authorized by the corporation. To my knowledge, Kadow did own one share of stock, and affiant could get nothing but evasive explanations from Nowell that he had not agreed to it.

The two houses erected in Juneau were sold and the money placed in escrow with Mike Monagle, who represented Kadow and Nowell. When inquiry was made by affiant of Kadow, in the presence of Nowell, as to the financial condition of the company, and what had become of the funds from the sale of West Juneau lots to the Alaska Housing Authority, and the sale of the four prefabricated houses, Kadow stated that after the payment of commissions in the sum of $4,200.00 on the sale of the West Juneau lots, and for which a check had been drawn on West Juneau, Inc., in that sum, the account balanced off.

The Bayview transactions were about the same, there being a slight loss, although the houses sold for $27,000.00 each. Kadow had his house and Bay-

view still owed him $4,600.00, or thereabouts, on his note.

Affiant had been given to understand by Nowell and Kadow that Sealand Construction Company, as an experiment in erecting "Lockwall" houses, would pay one-half of the labor, but, in the settlement, Kadow said the contractors demanded and were paid for all their labor expenses.

Mike Monagle wrote affiant on March 5, 1954, that he had no recollection of handling any money transactions for Bayview Realty, Inc. Affiant received a letter from Kadow stating that the settlement with the contractors was on a fifty-fifty basis, so evidently Kadow got the other half of the labor costs.

To this date, affiant has been unable to secure from Kadow, Nowell or their attorneys, the papers or documents covering the transactions indulged in by Kadow or Nowell. Mr. Nowell states in his affidavit that Bayview Realty had no assets, other than 450 shares of Fairview Development, Inc., stock. That is true, as Kadow and Nowell had removed all assets of the corporation, leaving only the 450 shares of Fairview Development, Inc., which had been placed there by an expenditure of $10,000.00 and fifteen months of affiant's time. Nowell contributed nothing to Fairview Development, Inc., nor did he devote any of his time to the initial work on Fairview. All this time he was employed by Alaska Freight Lines.

His statement that affiant furnished no funds to Bayview is false. Nowell contributed nothing to the original organization of Fairview Development, Inc., but did, until December, 1952, receive $1,000.00 per month, which was one-half of the $2,000.00 management fee, and drew from the Fairview Development, Inc., approximately $20,000.00, although he put in no time at the apartment house, Fairview Manor, and worked all the time at Seattle, Washington for Alaska Freight Lines. During all the time Nowell was receiving $1,000.00 per month, affiant received the same amount monthly and had the active management to the date hereof, and has devoted his full time to the project and the managment thereof.

That, due to the contractor's, Nelse Mortensen-Alaska Company, failure to complete the buildings and install the mechanical part of the project in its entirety, the sum of $142,228.15 or more was expended out of rentals to make good the contractor's shortcomings. But in spite of this heavy drain out of rentals, affiant has been able to make all payments on the mortgage, to wit: Approximately $21,600.00 monthly and keep all current bills paid and improvements made which has resulted in savings in operation of more than $15,000.00 per year.

That the expenditures for costs of construction chargeable to Nelse Mortensen-Alaska Company and other items payable by said contractor is attached hereto, marked Exhibit "A" and made a part hereof.

That by reason of doing the things the contractor had failed to do under the contract, the following savings have been effected in operational costs:

Savings in labor	$1,484.00 per month
Saving on coal (1953)	3,500.00 per year
Saving in electricity (1953)	3,600.00 per year
Saving in water treatment since September, 1953 ...	250.00 per month

That affiant has familiarized himself with all mechanical operations of the project and has, from the beginning, made improvements in the water distribution system and heating system, which have materially reduced the cost of operation and reduced the number of employees necessary to operate the project as hereinbefore shown.

That the appointment of a receiver could cause great damage to the project, as the heating system is controlled by a very complicated automatic electronic board, which, if it gets out of balance, can immediately shut off the entire system unless some one familiar with the operation of the board is available. Even the contractor who installed the electronic board did not understand the operation of the board, and it was only through a period of study and numerous communications with the factory that affiant has become familiar with the system. The only other person in Fairbanks or vicinity who understands the electronic board is Tom Cole, who has been connected with the operation and

maintenance of Fairview Manor for more than one year last past.

To entrust the operation of Fairview Manor to inexperienced persons would be to jeopardize the entire project.

The Mortensens and Henderson clamor about the dissipation of funds, but their intense desire is to secure control of the project in order to cover up the swindle which was perpetrated upon the owners and upon the Federal Housing Administration, as more fully shown by the Cross-Complaint lodged with this Court which clearly shows that the Mortensens and Henderson, as contractors, defrauded the owners and the FHA in excess of One Million ($1,000,000,000) Dollars and did fraudulently withdraw, by false affidavits, a sum in excess of $320,000.00 from the Seattle National Bank of Commerce, which funds were the property of Fairview Development, Inc., as more fully shown by letter from Pritchard & Lofquist, C.P.A., dated June 3, 1952, and marked Exhibit "B" and made a part hereof.

It is evident that the plaintiffs herein desire to secure control of Fairview Development, Inc., to head off an investigation that has been launched by the Senate Investigating Committee, as by having control of the books and property, they can conceal their obvious successful attempts to defraud the defendants herein, as hereafter shown.

That affiant and his wife secured a lease from the

City of Fairbanks to the land upon which Fairview Manor is situated. They, in turn, assigned the lease to Fairview Development, Inc., which secured a commitment from FHA for 272 rental units to be built upon the land.

An agreement was entered into with Nelse Mortensen-Alaska, Inc., to build the apartment buildings, with Fairview Development, Inc., furnishing the land and commitment, and Mortensen Co., to receive the total commitment of $3,080,000.00 and was to pay to Bayview Realty, Inc., or Cash Cole and Everett Nowell one-third of the profit on the contract.

The Fairview Development, Inc., agreed to assign to the contractor, Nelse Mortensen-Alaska, Inc., one-half ownership in the Fairview Manor when the project was completed, as specified in Construction Contract-Lump Sum, FHA Form No. 2442.

The original owners of Fairview Development, Inc., to show their good faith, permitted Cliff Mortensen to become a director of Fairview, and as further evidence of good faith, 900 shares of stock in the corporation was issued—450 to Bayview Realty—150 to Cliff Mortensen—150 to Nelse Mortensen and 150 to Frank V. Henderson, all of said stock to be held in escrow until the successful completion of the buildings.

Bayview stock had all been earned and paid for, as hereinbefore set out, and should have been retained by Bayview, but to maintain harmony, affiant

agreed to leave the Bayview stock with the 450 shares of Fairview stock issued to the Mortensens and Henderson in escrow until the completion of the contract.

Continuous discord had existed between the contractors and the other parties from the very first meeting of the Board of Directors and their attorney was continuously and persistently trying to upset the authority of the majority vote of the Board of Directors. As work progressed, it developed that the National Bank of Commerce was deeply involved financially with the Mortensen group, and in place of being a fair and impartial mortgagee, they were continuously doing things that were unfair to Fairview Development, Inc.

The regular procedure for draws by the contractor should have been as outlined in the FHA contract signed by both parties, with money released for the draws to the corporation which, in turn, would make the money available to the contractor. This procedure was completely by-passed by Cliff Mortensen, who presented to the National Bank of Commerce what purported to be a resolution authorizing the acceptance of the draws and Cliff Mortensen's signature on the released checks from the bank made payable to Fairview Development, Inc., as sufficient to release the money to him, thus by-passing the corporation completely. A letter of protest was sent the bank signed by Everett Nowell, as President, and Cash Cole, as Secretary-Treasurer of Fairview Development, Inc., but the bank paid

no heed to the letter and continued to release the money until all that remained of the total commitment was the 10% withheld according to FHA provisions to insure the completion of the job, which amount was $311,687.68. The contractor, contrary to his agreement, permitted liens to be placed upon the buildings, some of which still remain.

The National Bank of Commerce could carry the loan during the term of interim financing, but immediately the work was completed, it had to transfer the loan to the long-time lender, as their lending capacity was in the neighborhood of a million dollars. The title company would not guarantee the title with the liens upon the property and the Mortensens could not furnish the funds to guarantee the liens which amounted to some $470,000.00. So affiant and Nowell were asked to aid again by permitting the money to be placed in an escrow account to insure the payment of the liens. Nowell and affiant agreed to this procedure with Mortensen and the Bank, who were in grave trouble if the loan could not be transferred, but it was understood, and we were given assurance by the Bank, that the money would be retained by the Bank and not released until all bills were paid and liens removed. Immediately this was done, the Bank made up a request on FHA form asking for release of the final payment to the contractor. This form was not presented to the corporation, but was signed by Cliff Mortensen, as President of Fairview Development, Inc., and it stated that all bills were

paid and that there were no liens against the property. Thus the corporation was deprived of its right to withhold from the final distribution of moneys, payments that were due to Fairview Development, Inc., in the sum of over $100,000.00, and other amounts due sub-contractors. Thus Mortensen, in the gratis seat on the Board of Directors, having paid no money and having failed to complete the contract, exercised an unfair and unscrupulous method in depriving Fairview Development, Inc., of the full completion of plans and specifications outlined in the contract, in addition to forcing the corporation to expend from surplus rents over $142,288.15 for bills due to be paid by the contractor and the cost of unfinished work on the buildings as provided in the plans and specifications that had to be done in order to keep the project operating. The Mortensens then come forward with the claim that the project has been mismanaged and the funds earned dissipated and want the management removed for one reason and one reason alone, and that is to cover up the shortcomings in the performance of their contract and the forced expenditure of funds from earned rents that should have been paid by them.

In answer to their charge of mismangement and dissipation of funds affiant submits a recent report of a survey conducted by J. F. Campbell, Vice-president and Manager Mortgage and Loan Department of the Seattle Trust and Savings Bank, which is the representative of the long-time mort-

gagee, the Institutional Securities Corporation of New York, and the only agencies directly interested in the financial and physical welfare of the property; the second paragraph of which has the following to say: "First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing myself with the problems which you have had to face, one cannot help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project." This letter, marked Exhibit "C" is attached hereto and made a part hereof.

In summarizing, it should be borne in mind that the Mortensens brought their original charge in the name of Fairview Development, Inc., as an individual director; that there was no resolution of the Board of Directors authorizing such action; that the Mortensens are not in possession of their 450 shares of stock which could only be earned by their fulfillment of the contract, and this we submit in our Cross-Complaint with plenty of evidence to show that they have never completed the contract, according to Article 2, "Time of Completion," in the construction contract between the contractor

and Fairview Development, Inc., which specifically provided that in no event shall the owner be liable to deliver any such shares to the contractor, nor shall the contractor be entitled to exercise any rights as the holder of said shares until final payment is due and payable as herein set forth.

In reference to the statement of Cliff Mortensen on Page 3 of his Supplemental Affidavit in support of Amended Motion for Receiver in which he alleges that the Fairview Manor showed a loss of $56,340.73, this is not true, as during the prior year expenditures of Fairview Development, Inc., made to complete work which the Mortensens and Henderson failed to do under their contract, amounting to $14,766.68, were transferred to 1952 expense account. That the sum of $14,850.26 expended in prior years was transferred to 1951 expense account. It was during the years of 1951 and 1952 that the sum of $142,288.15 was paid out of rental income to perform necessary work which the plaintiffs failed to do under the contract. This should have been carried as capital gains, but was carried as current expenses.

Vacancies are carried as an expense. In 1953, in spite of vacancies, shown as $52,318.75, the book loss was only $30,718.07. This is illustrated by the breakdown for 1953 and the first three months of 1954, prepared by Allene Hendricks, accountant, which is marked Exhibit "D" and made a part of this affidavit. Although the three months of 1954 are the cold months, with a larger volume of

vacancies, the actual operating loss, including vacancies has been only $10,411.77.

Vacancies for the year 1953 amounted to $52,-318.75, and the operating loss for the year was $30,-718.07. The same thing took place this past winter as happened during the year of 1952. The Military opens their housing in the middle of the Winter, instead of the Summer, and, of course, in the Winter there is no surplus of tenants or demand for housing and the loss simply has to be absorbed. Our loss in 1952 was slightly over $52,000.00. This year was $20,000.00 less. Most of the saving was made in cutting the cost of operating. The average monthly expense for 1953 was $28,578.58. As compared to the first three months of this year—January, February and March—the saving each month was well over a thousand dollars. Thus, last year, in March, when we had current accounts payable for coal and light, the total was approximately $22,000.00, but as of January, our loss added up to a little over $10,000.00, which at the present rate of occupancy, we will have paid off by the first of June. So the year 1954 will find the project in much better financial condition when Winter arrives. This has been due solely to savings that have been made by improvements in the boiler rooms, amounting to a saving of approximately $3,000.00 a month. The only large item of expense we have this Summer is the exterior painting which has to be done over, on account of the water leakage behind the plywood covering on the building due to lack of proper in-

stallation by the contractor. Otherwise, the project, notwithstanding all the handicaps that have been placed upon it by the plaintiffs, as contractors, can survive and fill a much-needed housing requirement in the city of Fairbanks.

Now, for comparison of management efficiency, affiant calls the Court's attention to a housing project owned by the plaintiffs, Mortensens and Henderson, at Fairbanks, Alaska, known as Island Homes. This project consists of approximately 200 dwellings which were completed in 1952. From the time of completion to the Fall of 1953, the said project was 90% vacant, and at the date hereof, according to available information, 40% or more vacant. Will the plaintiffs be as successful managing Fairview Manor as they are managing Island Homes?

Cliff Mortensen complains of affiant's drawing $1,000.00 per month, with apartment. Is that an exorbitant salary for managing a three-million-dollar project? Cliff Mortensen, with a few strokes of a pen to fraudulent affidavits, drew in excess of $330,000.00, the money of Fairview Development, Inc.

Affiant has put all of his money and four years' work into Fairview Development, Inc. The Mortensens and Henderson have contributed nothing to the project, and now want to deprive affiant of all his interest in the same without any consideration whatsoever.

The contract for management was made by affiant with Fairview Development, Inc., when Everett Nowell and Cliff Mortensen were the other two directors.

No injury can result from affiant's operation of the project. The lending agency, Institutional Securities Corporation of New York, is very well pleased with affiant's management. As the mortgagee of the project, with a loan of $3,080,000 at stake, they have implicit confidence in affiant's ability to properly manage the project, as shown by the letter of J. F. Campbell, of the Seattle Trust and Savings Bank of Seattle, the representative of the mortgagee.

No showing has been made that affiant could not respond in damages, if damage did result from his management of the project. Mere conclusion and unfounded statements are no evidence of affiant's inability to respond in damages. Bayview Realty, Inc., owns 450 shares of stock in Fairview Manor, which is one-half of all the stock outstanding and represents an ownership by affiant of one-half interest in Fairview Development, Inc. Such a one-half interest in a three-million-dollar housing project should be ample security against damage from mismanagement.

Exhibit "D," showing the income, operating expenses and fixed charges for the years 1953 and 1954, up to and including March 31st, taken in conjunction with Exhibit "A," attached hereto, which shows in excess of $140,000.00 expended out of rentals for the contractor's shortcomings, the finan-

cial position is very good. If the contractors had performed the contract according to plans and specifications, the project would have now a healthy bank balance.

One item of the contractor's failure to follow plans was the construction of all the buildings below the grade established by the architect, which requires snow removal to prevent melting snow or heavy rains from flooding the basements. The average yearly expense for this one item is $10,000.00.

In summarizing, affiant believes that the facts, as presented herein by the defendants, clearly indicate that affiant has been the victim of a fraudulent scheme concocted by Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, individually, and through their alter egos, Nelse Mortensen-Alaska, Inc., and Nelse Mortensen Construction Company, and aided and abetted by Everett Nowell and W. A. Rushlight.

Exhibit "B," attached hereto, is a copy of a letter written by the accountant of the Mortensens and Frank V. Henderson. This Exhibit shows beyond doubt that Cliff Mortensen withdrew from the Seattle National Bank of Commerce, a sum in excess of $320,000.00, which were funds of Fairview Development, Inc., and deposited said funds in the account of Nelse Mortensen-Alaska, Inc

Exhibit "A," clearly indicates the funds expended by affiant in doing work that should have been done by plaintiffs and meeting other obligations of the contractor.

Defendants' Cross-Complaint, lodged in this case, to which reference is hereby made, sets out in detail all matters in which the plaintiffs were derelict in their duty in the construction of the apartments. Dereliction of duty is a term much too mild; in fact, the actions of the defendants have resulted in investigators for the Senate Investigating Committee to make lengthy study of the plaintiffs' nonperformance of the contract for the building of Fairview Manor, and the recovery of funds from the lending agency, which loan was guaranteed by FHA, an instrumentality of the United States.

Furthermore, affiant believes that he should be relieved of the obligation of the stipulation entered into by all the parties hereto, and the judgment based thereon, for the reasons set forth in affiant's Motion to wit: Mistake, excusable neglect, surprise and fraud practiced by plaintiffs and by conspiracy between the plaintiffs and W. A. Rushlight and Everett Nowell.

Denial of defendants' Motion to set aside and vacate the stipulation hereunto entered into by the parties and the judgment based thereon would deprive the defendant of his day in Court, and would enable the plaintiffs to perpetrate the greatest swindle in the history of Alaska.

Affiant makes a part of his Motion to vacate and set aside the stipulation and judgment based thereon and in opposition to plaintiffs' Motion for appointment of receiver all the affidavits heretofore filed herein by this affiant, Tom Cole, Ruth Cole, Dr.

Ribar, Allene Hendricks, and defendants' Amended Answer and Cross-Complaint lodged herein.

/s/ CASH COLE.

Subscribed and Sworn to before me this 2nd day of April, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires 8-11-55.

EXHIBIT A

(Copy)

Fairview Development, Inc., Charged to Nelse Mortensen-Alaska Company for Expenditures by Fairview Development for Costs of Construction and Other Items Payable by the Contractor

Item No.	Description	Amount
1.	4—1½ h.p. water pumps installed, substituting for 2—15 h.p. water pumps	$ 3,146.26
2.	Fire Extinguishers (in plans)	1,461.24
3.	Fire hose racks (in plans)	1,565.49
4.	Fire hose (in plans)	571.40
5.	Fire rope (in plans)	108.67
6.	Silent check valves (in plans)	300.00
7.	Hot water controls (in plans)	243.64
8.	32 meters for laundry (in plans)	1,032.05
9.	Laundry room changes in specifications (in plans)	1,048.10
10.	Storm windows and ventilating water pipes in garages furnish heat from halls to keep from freezing	3,500.00
11.	Louvres installed to keep ice from forming on roof (in plans)	5,000.00

12.	Apartment door numerals (in plans)		137.03
13.	Interest on mortgage: Payable by contractor		
	Due 1-1-52	$9,075.26	
	30 days delinquent interest	30.25	
	Due 2-1-52	9,194.76	
			18,300.27
14.	Real estate taxes, levied 8-1-51—payable by contractor		31,612.00
15.	Removal of ice caused by failure of contractor to install ventilators in attics—4 men for 5 months @ $500.00 per month per man		10,000.00
16.	Services of firemen on unfinished building		560.00
17.	Rent of apartment for Frank Henderson for 11 months (up to and including August, 1952)		2,226.00
18.	Rent of garage for Frank Henderson for 11 months		200.00
19.	Cost of installation of second well, based on bid (in plans)		15,000.00
20.	Cost of connection hook-up on fire hose, hanging fire extinguishers and installing fire ropes		3,600.00
	Total		$101,612.15
21.	Covering exposed heating pipes in hallways (in plans)		2,000.00
22.	Extending smokestacks, material and labor		5,000.00
23.	Other labor and expenses connected with installations and improvements		35,616.00
	Grand total		$142,228.15

EXHIBIT B

(Copy)

Pritchard & Lofquist
Certified Public Accountants
1711 Exchange Building
Seattle 4, Washington

June 3, 1952.

Mr. Cash Cole,
c/o Fairview Development, Inc.,
Box 647,
Fairbanks, Alaska.

Dear Cash:

In checking the records of Nelse Mortensen Alaska Co., for the current year to date, we noted that the funds of Fairview Development Co., which had been retained by the National Bank of Commerce, being the retained percentage of the construction funds and the unused balance of the mortgage interest funds, which funds totaled $311,687.68, appear on the books of Nelse Mortensen Alaska Co., as having been paid to them on April 29, 1952. Their books further show that on May 7, 1952, they received from the National Bank of Commerce, the balance of funds in escrow for working capital in the amount of $10,125.49.

In attempting to get a verification of these amounts paid, such as to whom the checks were issued, we were advised that the payment of $311,687.68 was released on May 1, by cashier's check and that the sum of $10,125.49 was released on May

7, 1952, on a mortgage loan check No. 6030 payable to Fairview Development, Inc.

* * *

Yours very truly,

PRITCHARD & LOFQUIST,

By /s/ H. F. LOFQUIST.

EXHIBIT C

(Copy)

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

30 June, 1953.

Fairview Development, Inc.,
Fairview Manor,
Building #2, Office,
Fairbanks, Alaska.

Attn: Mr. Cash Cole.

Re: ISC Trust T241-1—Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Sirs:

After my inspection of this apartment property, I communicated with the Institutional Securities Corporation of New York, for whom we service the underlying mortgage and we now have their in-

struction to report to you in detail of our findings on the condition of the buildings, and to request that you prepare for us a schedule for repairs so that some assurance can be given to the Institutional Securities Corporation that the necessary work is to be done before the arrival of cold weather.

First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.

You must realize that the various claims and interests of the individual owners of the stock of Fairview and their individual problems, are of no concern to the mortgagee or to us as servicing agent for them; our interest at this point is purely one of preservation of the security of the mortgage.

The requirements for the project, as a whole, are:

1. Correction of grade of sidewalks to bring them above the level of the moisture. We recommend that all sidewalks be covered with an additional 5½ to 6 inches, up to the level of the present first steps.

2. A program for interior decoration should be begun, and until some better yardstick is offered, we think the figure in the FHA Project Analysis estimated at $19,168.00 per annum would be an acceptable figure. If interior decorating is done on a program basis, repainting the interiors and trim as necessary, you will not face heavy expenditures with available funds lacking at some future date, and your occupancy should continue to be maintained at a high level.

3. Landscaping and planting has not been satisfactorily complete, and this must be done in order to comply with the building program. Unless this is done to implement the attractiveness of the project, we feel that competition with other attractive rental units will seriously impair the occupancy of your apartments.

We call to your attention that the National Bank of Commerce, here in Seattle, holds a deposit in escrow of $8,800.00 to assure the completion of landscaping and planting; and that it also holds in addition the sum of $1,080.00 for completion of curbs and driveways. We are informed that the FHA has accepted the curbs and driveways and therefore assume that you may now seek the release of those funds; however, we find no record of their acceptance of the landscaping and planting and so we assume that the work must be completed in a manner satisfactory to the FHA and that you may thereafter seek the release of the funds held for that purpose in the aforementioned escrow.

Our review of the individual buildings indicates the following repairs to be necessary, in addition to the above specific requirements for the over-all project:

Building No. 1

Exterior paint is needed on the west end of Section "E"; on the west end of Section "B"; and on the south side of Section "H." We concluded that these items are urgent for the preservation of the security.

Building No. 2

Exterior paint is needed on the west side of Section "H"; on the east side of Section "H"; and the south sides of Sections A, B, D & E, also G & H; and on the west side of Section "A."

The ridge cover has apparently been damaged either in the process of installing vents on the building or in ice removeal, and this should be immediately checked and straightened or replaced.

Also the grade of the driveway should be changed from the rear of the building to carry the water away from the building at Section "D," to eliminate the possibility of water draining into the boiler room.

Building No. 3

Exterior paint is badly needed on the west end of Section "H"; on the south side of Section "H," and on the east side of Section "H." Also there is evidence of some necessary roof repair on this building.

and it is recommended that aluminum patches be put over the holes created by ice chopping. It is also noted that the change-over on the 3-way valve was to have been completed during the early part of June, and we should appreciate your confirmation that this work has been satisfactorily completed.

Building No. 4

Exterior painting is urgently needed on the south and west sides of Section "A"—on the south side of Section "B," and on the east side of Section "H." Also, some of the driveway adjacent to this building has been damaged and should be replaced. During the early part of June you were in the process of completing the change-over onto the 3-way valve in this building also and we shall appreciate your advice whether that work has been satisfactorily completed.

In connection with the roof repairs mentioned as necessary regarding Building #3, it may be found that there are additional holes in the roof structures on parts of the other buildings, although we were unable to find them without the proper equipment, and it is suggested therefore that a careful survey of all the roofs be made by a competent workman who would make all of such repairs as are found necessary.

We shall appreciate your immediate acknowledgment of this letter, and a detailed report in the very near future of your plan for the maintenance of

the property which we deem so necessary in order to protect the security of the mortgage and to eliminate waste to the property.

Yours very truly,

/s/ J. F. CAMPBELL,
Vice President and Manager
Mortgage Loan Department.

JFCampbell:awe

Via airmail

cc: Mr. C. A. Carroll,
FHA Terr. Director,
Juneau, Alaska.

EXHIBIT D

1953	Income	Expenses	Average Monthly Expense
otal estimated income from all available sources	$506,413.44		
acancies		$ 52,318.75	
otal operating expenses including interest ($10,023.00)		342,943.02	$ 28,578.58
ayment on mortgage		141,869.75	
	$506,413.44	$537,131.51	
Loss			$ 30,718.07

1954	Jan.	Feb.	Mar.
otal estimated income from all available sources	$ 43,077.40	$ 43,119.92	$ 42,973.87
acancies	8,575.81	8,630.47	6,874.15
otal operating expenses including interest ($10,023.00)	27,030.02	27,437.79	26,135.00
ayment on mortgage	11,653.24	11,653.24	11,653.24
Total	$ 47,259.07	$ 47,721.50	$ 44,653.24
Loss	$ 4,121.67	$ 4,601.58	$ 1,688.52
Total loss			$ 10,411.77

aken from the books of Fairview Development, Inc., as of March 31, 1954.

/s/ ALLENE HENDRICKS.

EXHIBIT E

(Copy)

Kenneth D. Gillanders
Certified Public Accountant

March 22, 1954

Telephone 3033,
516 Second Avenue,
P. O. Box 1210,
Fairbanks, Alaska.

Mr. Cash Cole, President,
Fairview Development, Inc.,
Bldg. 2, Apt A-2, Fairview Manor,
Fairbanks, Alaska.

Dear Mr. Cole:

In accordance with your request to assist your bookkeeper with the closing of your accounts and records for the year ended December 31, 1953, the following report is herewith presented.

Scope of Work Done

Upon inspection of the records it was immediately recognized that more than the normal assistance with closing work would be necessary in order for the accounts and records to in any way reflect the actual status of the project at December 31, 1953. At this time a further conference was held with you pointing out the following major discrepancies, and incomplete factors:

1. There were no prior year Certified Audit Reports on file.

2. Prior auditors' adjustments in 1952 affecting 1951, and 1953 adjustments affecting both 1951 and 1952, had not been adjusted retroactively that is, there was no evidence that 1951 and 1952 Federal and Territorial Income Tax Returns had been amended to show these major adjustments.

3. Depreciation on apartment buildings had been taken on the 1951 returns at the rate of 5% on declining balance, and on the 1952 returns at the straightline rate of 3%. There was no evidence that an application had been made to the Director of Internal Revenue for permission to change depreciation methods.

4. A prior auditors' report dated October 2, 1953, listed a detailed schedule of "Reclassification of Janitors' and Cleaning payrolls" covering the period August 1, 1951, to August 31, 1953, showing that substantial amounts should have been capitalized. Also was included a schedule analyzing the account "Repairs, Material" which indicated that the "greater portion of this material went into new assets that should have been capitalized or been charged back to the general contractor." Neither of these adjustments had been entered in the books.

5. Test checking into support for some of the above-listed items disclosed many invoices could not be found, and hence it would be impossible to make a detailed Certified Audit Report.

6. The only capital stock recorded in the general ledger is $100.00 preferred stock. I am informed

there were also initially issued 3 shares of common stock, and later on an additional 900 shares.

After discussion of the above factors you authorized me to make major adjustments as between years, to record prior auditors' findings not previously entered in the records, and to prepare amended Federal and Territorial Income Tax Returns for 1951 and 1952 as well as prepare 1953 returns.

Accordingly, I have made, in addition to many small adjustments, the following major adjustments:

A. Adjusted from 1952 to 1951 a prior auditor's adjustment No. 1 made April 30, 1952, "effective in 1951," recorded by Journal Entry "J21A," charging $75,305.00 to "Payable Nelse Mortensen Alaska, Inc.," and crediting building costs to reduce recorded costs down to contract price of $3,080,000.00.

B. Adjusted from 1953 to 1951 a prior auditor's adjustment made as of August 31, 1953, charging $31,612.00 to "Payable Nelse Mortensen Alaska, Inc.," and crediting "Surplus" for "property taxes for 1951 during Construction." Also entered from same auditor's adjustments of August 31, 1953, the following, all of which were charged by the auditor to Nelse Mortensen Alaska, Inc.:

Transferred to 1951:

Interest on mortgage	$9,075.26
Insurance on mortgage	5,775.00

Transferred to 1952:

Interest on mortgage	$9,225.01
Insurance on mortgage	1,925.00
Real and personal property taxes	3,616.67

All of these adjustments had been credited to 1953 expense accounts, although applicable to years shown above.

C. Recorded prior auditor's adjustments contained in schedules mentioned under Item 4 above.

D. Segregated "Power Plant" and "Maintenance Shop" from other asset and expense accounts to more clearly show the nature of the assets.

E. Adjusted Depreciation for 1952 and 1953 back to 5% same as 1951.

F. Assisted your bookkeeper make other adjusting and closing entries for 1953. She is now in a position to proceed with entering 1954 business, and it is felt she is qualified to enter it correctly so there will be no need for such major adjustments in the future as have been necessary this time.

It will be noted that no new adjustments have been made to the Nelse Mortensen-Alaska, Inc., account, nor has any common stock been set up, as it is understood these, among other things, are subject to a current lawsuit. Hence these items will be adjusted as required after such suit is settled.

In view of the above situation, no statements are being submitted at this time and an extension has been obtained for filing your Federal and Territorial

Income Tax Returns, as it is deemed advisable to defer such items rather than to issue them when known to have such major items in dispute. Also, to issue a Corporation Balance Sheet without showing any ownership, that is, common stock, certainly would seem incomplete.

Your attention is again called to the fact that no certified audit of your records has been made, and, in fact, it would probably be impossible to do so. However, after your lawsuit is settled, and the items in dispute are determined, it will be possible to make the necessary adjustments and resulting statements that will then have some value.

Very truly yours,

/s/ KENNETH D. GILLANDERS.

KDG:mc
cc: mlk

Receipt of Copy acknowledged.

[Endorsed]: Filed April 3, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on duly and regularly for hearing on the motion of the defendants, Cash Cole and Bayview Realty, Inc., filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Pro-

cedure, to set aside the stipulation of the parties filed in said cause on October 9, 1953, and vacate the final judgment entered thereon on October 10, 1953, and for leave to file a cross-complaint or counterclaim lodged with this court; and further upon the amended motion of the plaintiffs, Fairview Development, Inc., an Alaska Corporation, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., for the appointment of a receiver to take over the management and operation of Fairview Manor Apartments and all other property and assets and income of said plaintiff corporation, Fairview Development, Inc., which motion was filed in the above cause on March 19, 1954; and further upon the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their name, or names, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; and the plaintiffs in the above-entitled cause being

represented by their attorneys, Joe Diamond and Earle Zinn, and Collins and Clasby, by Walter Sczudlo, and the defendants being represented by their attorneys, Bell & Sanders and Warren A. Taylor, by Warren A. Taylor, at said hearing and argument on said motions; and the court having considered the settlement agreement embodied in said stipulation filed in this cause on October 9, 1953, and the final judgment and decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, and the various proceedings and the trial had in this cause, and the affidavits filed by said defendants Cash Cole and Bayview Realty, Inc., in support of their said motion above mentioned and in opposition to plaintiffs' motions, and the various affidavits filed by the plaintiffs in opposition to said motion of defendants and in support of their motions for a receiver or to show cause hereinbefore mentioned, and all the pleadings and proceedings heretofore had herein, and having heard statements of counsel and their arguments and being otherwise fully advised in the premises, makes the following:

Findings of Fact

1. This was in the nature of a stockholders' suit filed by the plaintiff corporation and owners of 50 per cent of its common stock to secure appointment of a receiver and an accounting from the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and, if necessary, to wind up said corporation

for the following reasons, among others: Existence of an impasse in the conduct of its corporate affiairs due to deadlock and dissension in the Board of Directors and among the stockholders; dissension and discord as to who, in fact, comprise the directorate; improper disposition of corporate funds; dissipation of corporate assets; impairment of corporate property; and usurpation of control and possession of corporate assets, income and profits by the defendants, owners of the other 50 per cent of the common stock, and exercise by them of corporate powers without the authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, bylaws and the General Laws of the Territory of Alaska.

2. The principal defendants, Cash Cole (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc,); Everett Nowell (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.); and Bayview Realty, Inc., filed an answer in the nature of a general denial.

3. The trial commenced on October 5, 1953, and continued during that day, including the taking of the testimony of Cash Cole on direct examination as an adverse witness for the plaintiffs. That evening he purportedly suffered a heart attack, and the trial was continued from day to day until the entry of the final judgment, except for the taking of the testimony of Arnoldine Scott. Negotiations were im-

mediately undertaken for the purpose of settling the various claims of the parties involved in this case, other pending litigation between them, and the case filed by A. G. Rushlight & Co., No. 7163, to foreclose its mechanic's lien against Fairview Manor.

4. On October 8, 1953, Robert E. Sheldon was appointed as receiver in this cause for the Fairview Manor and all the assets of the corporate plaintiff, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial, and the purported illness of Cash Cole.

5. A written stipulation settling all claims of the parties in this case was executed by them October 9, 1953, providing, among other things: (a) For sale of the common stock owned by the Mortensens and Henderson to Cash Cole; (b) release of all claims against Cash Cole and Fairview Development, Inc., by the Mortensen group in consideration of the payment of $89,000.00 by Fairview Development, Inc., payable $6,800.00 at the time of execution, $3,200.00 on December 31, 1953, and thereafter $5,000.00 quarter annually; (c) security for performance by said Fairview Development, Inc., of said agreement to pay by deposit in escrow of all of the common stock then owned or acquired through the settlement by Cash Cole, Everett Nowell, and Bayview Realty, Inc., such stock in the event of default to become the property of the Mortensens and Henderson in satisfaction of said sum of $89,000.00; (d) payment by the Mortensen group to Nowell of

a claim of $6,800.00, and dismissal of litigation involving said claim; (e) assumption by the Mortensen group of responsibility for claims of mechanic's liens by Pilip & Butt Painting Contractors, Inc., and C. H. Keaton involved in the above-mentioned case No. 7163; (f) release to the Mortensen group of approximately $8,800.00 held on deposit at the National Bank of Commerce in Seattle; (g) dismissal of all pending litigation with prejudice; (h) resignation of Mortensen and Henderson as officers and directors; (i) agreement for no change in the corporate articles of the plaintiff corporation, or incurrence of any unusual debts until payment of said sum of $89,000.00; (j) approval of the stipulation by court; (k) and execution of such other documents as might be subsequently required to consummate terms of said settlement. At the same time a separate settlement agreement was made with A. G. Rushlight & Co., of its claim in case No. 7163, and filed in the form of a stipulation providing payment of $125,000.00 by the Mortensen group to said claimant. A final judgment approving the settlement filed in this cause was entered on October 10, 1953, by this court and provided for discharge of the receiver and the carrying out of the terms and provisions of the agreement contained in said stipulation.

6. On January 8, 1954, the defendants, Cash Cole and Bayview Realty, Inc., filed a motion to set aside said stipulation and vacate said judgment under Rule 60 (b) of the Federal Rules of Civil

Procedure upon the following grounds: (a) Fraud; (b) mental incapacity of Cash Cole as a result of heart attack; (c) mistake, inadvertence, surprise, excusable neglect; (d) conspiracy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance and confiscatory; (f) no authority by boards of stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratification of stipulation by Cash Cole. In support of said motion various affidavits have been filed by defendant Cash Cole, and by Tom Cole and Mrs. Ruth Cole.

7. On February 13, 1954, the Mortensens moved for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of the final decree entered October 10, 1953, and the settlement agreement evidenced by the stipulation filed October 9, 1953, and for failure to deliver the capital stock of plaintiff corporation as provided in said decree and stipulation, or in the alternative that an order be entered directing them to assign and deliver the certificates evidencing said stock to the Mortensens and Henderson. An amended motion was likewise filed March 19, 1954, for reinstatement of Robert E, Sheldon as receiver in this case or for appointment of some other disinterested person as receiver to take over the management of Fairview Manor Apart-

ments and the assets of the plaintiff corporation, until said defendants have complied with the terms and provisions of said final decree and stipulation. Affidavits in opposition to defendants' motion to vacate and in support of the motions to show cause and for appointment of receiver have been filed by the plaintiffs Cliff Mortensen and Frank V. Henderson, and by Joe Diamond, Earle Zinn, Everett Nowell, W. A. Rushlight, and Dr. Joseph M. Ribar.

8. A notice of default and demand executed by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, dated February 9, 1954, and filed herein on February 13, 1954, was served on defendants, showing their defaults under the settlement agreement, and termination of ownership thereby in stock pledged as security.

9. Negotiations to compromise the conflicting claims of the parties involved in this cause, as well as the claim of A. G. Rushlight & Co., were undertaken at the suggestion of Nicholas Jaureguy, attorney for Cash Cole, and W. A. Rushlight, immediately after the trial was continued on October 6, 1953. The negotiations for settlement were conducted by Nicholas Jaureguy, as attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, Attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and Fairview Development, Inc., and other plaintiffs. The following attorneys appeared

of record for the defendants at the time of the trial and negotiations: Cake, Jaureguy & Hardy of Portland; Morrissey, Hedrick, Roberts & Dunham of Seattle; and J. Hellenthal of Anchorage. These several attorneys represented independent of each other the respective conflicting claims of the parties to this cause and conducted personally the negotiations. Nowell, Mortensen and Henderson personally participated in said negotiations. Cash Cole participated in them through his attorney, Jaureguy, and said Rushlight, and the various compromise plans were submitted from time to time to him personally.

Several compromise plans were considered, containing the basic provisions embodied in the ultimate settlement evidenced by the stipulation, filed in this cause on October 9, 1953. Jaureguy, Cash Cole, and Rushlight gave careful consideration to the compromise plan for the purpose of: Purchasing the interests of the Mortensens and Henderson so as to gain control of Fairview Development, Inc., and Fairview Manor; settling the various claims of said parties against each other; securing the discharge of Robert E. Sheldon, receiver then recently appointed in this case; securing dismissal of other litigation pending between these parties; avoiding further trial in this case; and securing payment of the claims of lien of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. The interests of these various groups in this case were adverse to each other, and each group person-

ally or through its attorneys, conducted the negotiations independently for its own benefit, without misrepresentation, or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage, since all phases of said negotiation and proposed settlement were known to each of said groups, and to Cash Cole, his son (Tom Cole), his wife, and Jaureguy, his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc., during this entire period.

10. The several compromise plans considered during the negotiations were reciprocal in nature in that the Mortensens and Henderson were willing "to buy or sell" on the same terms and conditions, that is, to buy out the interests of the principal defendants in the plaintiff corporation and settle all conflicting claims, or to sell their interests in the plaintiff corporation to the principal defendants and to settle all conflicting claims. The final compromise evidenced by the stipulation filed October 9, 1953, in this case, was a similar "to buy or sell" offer, which Cash Cole elected to accept as a buyer.

11. Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. In his later affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to

Jaureguy, attorney for Cole, about the final settlement agreement. He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge. Plaintiffs' affidavits do not contain any such conflicting representations, but unequivocally state that both Mrs. Cole and Tom Cole, as well as their attorney Jaureguy and W. A. Rushlight, had full knowledge of all of the negotiations and especially the terms and conditions of the final compromise plan embodied in the stipulation, which they now seek to set aside.

12. Dr. Joseph M. Ribar attended Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters, and admitted that he was unable to state as to whether Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency. Rushlight states in his affidavit that Cash Cole was fully aware of what was going on and understood each and every matter contained in the stipulation and all ancillary matters. He further states that he

was advised of the progress of the negotiation and terms of the compromise plan not only by himself but likewise by his attorney Jaureguy.

The affidavits submitted on behalf of defendants Cash Cole and Bayview Realty, Inc., to vacate the decree contained conflicting statements with respect to his comprehension and capacity. Cash Cole, in his affidavit, states that he did not ascertain the intent and import of said stipulation until about one month after the execution thereof. Tom Cole in his affidavit states, on the other hand, that it was "several days after the agreements and notes were signed" before Cash Cole ascertained the nature thereof. Ruth Cole in her affidavit states that Rushlight discussed with Cash Cole for several days the settlement negotiations, but at page 2 thereof states that it was "several weeks" after the stipulation was signed before he knew what it contained. Cash Cole swears in his affidavit that he was unable to read the stipulation for a period of one month after he signed it, because of the drugs administered to him. Dr. Ribar, however, states that the effect of said drugs was limited to approximately 72 hours after their adminstration, and that such effect would not continue for one month. Tom Cole in his affidavit admits that Cole could read after a week.

13. In support of the motion seeking to vacate the final judgment on the ground of fraud and conspiracy, the principal defendants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions as follows: That plaintiffs

"acting in concert with one W. A. Rushlight" induced him to sign the stipulation, when he did not know the contents thereof; that Cash Cole relied on a false and fraudulent statement as to the contents of said stipulation made by "A. G. Rushlight Co."; that he "believes" that the Mortensens and Henderson, Rushlight, and Nowell conspired to secure his stock in the plaintiff corporation, knowing that he could not make the payments provided in the stipulation, demand note and agreement (apparently the demand note was the one to Rushlight and the agreement was the one with Nowell, neither of which had any place in the stipulation involved in this cause); that Mortensen, Henderson and Nowell, acting in concert with Rushlight began negotiations with Cash Cole to sell their stock to Cole; that it was evident to Cash Cole that the "plaintiffs had concocted a scheme" to secure not only the profits from contracts of construction, but also over $1,000,000.00 by failing to do the work, etc.; and that reading of Nowell's letter of May 24, 1951, criticizing actions of Cash Cole, made it clear to Cash Cole that Nowell's responsibilities as a director in Bayview Realty, Inc., and Fairview Development, Inc., were secondary to his personal affairs.

The other parties to the negotiations deny any such conspiracy, fraud or other charges and in their affidavits set up the ultimate facts leading up to the settlement and said stipulation as hereinabove indicated. At all times the Mortensens and Henderson were willing to buy the interests of the principal

defendants and settle all claims on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation.

14. Cash Cole admits that the reason for failure to perform the settlement agreement and make the payments required thereunder was due to the 55 or more vacancies since November, 1953. Apparently this is the only reason for the statement in the motion to vacate the judgment and in the prior affidavit of Cash Cole that said settlement agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of his interests. In the affidavit filed by Tom Cole the alleged impossibility of performance of the stipulation involved in this cause is tied in with the separate agreements made with Cash Cole, Nowell and Rushlight which were not involved in said stipulation and were not a part thereof.

15. Cash Cole accepted the benefits of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of various litigation hereinafter mentioned, payment by them of $125,000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Contractors, Inc., and release and settlement of other conflicting claims. No restitution has been offered by Cash Cole and Bayview Realty, Inc., or others in their behalf, to place the parties in the same position as they were at the

time of the filing of said stipulation on October 9, 1953.

16. The following claims of mechanic's and materialman's liens had been filed, and foreclosure thereof was sought in case No. 7163, filed against Fairview Development, Inc., Nelse Mortensen-Alaska, Inc., and others, by A. G. Rushlight and Co.

(a) A. G. Rushlight and Co., Inc.—Claim, $344,-973.30; attorneys' fees, $35,000.00; and costs.

(b) Pilip & Butt Painting Contractors, Inc.—Claim, $77,681.62, and interest accrued thereon; attorneys' fees, $5,000.00; and costs.

(c) C. H. Keaton, d/b/a Keaton Paint Co.—Claim, $17,349.44, and interest accrued thereon; attorneys' fees, $2,000.00; and costs.

W. A. Rushlight would enter into no settlement of said Rushlight lien unless a settlement was likewise made with Cash Cole on terms and conditions acceptable to said Cash Cole. The stipulation filed in the subject case provided for assumption by the Mortensens and Henderson of said liens. Simultaneously with the filing of said stipulation, a stipulation was likewise filed in case No. 7163 by the Rushlight Company and Mortensens and Henderson agreeing to the payment of $125,000.00 in settlement of the Rushlight lien. Payment was thereafter made and an order was entered on November 20, 1953, dismissing the amended complaint of the Rushlight Company. On February 16, 1954, a stipulation was filed wherein Pilip & Butt Painting Contractors, Inc.,

certified to the settlement and payment of its claim and an order was entered on that date dismissing the cross-complaint of said claimant in said case.

17. At the time of the trial, settlement and final decree in this case the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by the Mortensens and Henderson:

(a) A. G. Rushlight and Co., a corporation, vs. Nelse Mortensen-Alaska, Inc., a corporation, Fairview Development, Inc., et al., No. 7163, foreclosure proceedings above mentioned.

(b) Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight and Co., a corporation, No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division.

(c) Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, d/b/a Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, et al., No. 44280, in the Superior Court of the State of Washington for King County.

(d) Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., No. 3532, in the District Court of the United States for the Western District of Washington, Northern Division, for damages in the sum of $699,912.27, sought against the Mortensen Construction Company based upon exaggerated and groundless claims.

18. The settlement agreement contained in the stipulation (par. 2, 9) provided that all of the capital stock of Fairview Development, Inc. (except the 100 shares of preferred stock), consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc., from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc., would be placed in escrow, as security for the payment of the sum of $89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. It was understood under said settlement agreement that all of said voting stock would remain in escrow so that in the event of any default the Mortensens and Henderson would be entitled to all of said stock as their own property, except said 100 shares of preferred stock. Cash Cole, Nowell and Bayview Realty, Inc., failed to deliver said stock in escrow for the purpose of said security.

19. Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have fully performed all the terms and conditions of the settlement agreement, including: (a) Payment of $125,000.00 to A. G. Rushlight & Co., in settlement of its claim in case No. 7163; (b) dismissal on November 20, 1953, of the Rushlight amended complaint; (c) settlement of the claim of Pilip & Butt Painting Contractors, Inc., and payment thereof; (d) making provision for defending against the claim of C. H. Keaton without cost to Fairview Development, Inc.; (e) securing dismissal of other suits pending in the State

of Washington hereinabove mentioned; and (f) payment to Nowell of $6,800.00 under stipulation (par. 3).

20. Bayview Realty, Inc., Cash Cole and Nowell have defaulted under the stipulation and settlement agreement in the performance of the terms and conditions thereof, including: (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of the obligation of $89,000.00 undertaken by Fairview Development, Inc.; (b) failure to pay $6,800.00 at time of execution of settlement agreement and stipulation; (c) failure to pay $3,200.00 on or before December 31, 1953; (d) refusal to permit Fairview Development, Inc., to pay said sum of $89,000.00, the maturity of which was accelerated by Notice of Default and Demand, dated February 9, 1954, filed in the above cause February 13, 1954.

21. The various affidavits of the parties contain references or statements in connection with the motion of said defendants to set aside said stipulation and vacate said final judgment with respect to the income of Fairview Manor Apartments, the plaintiffs' knowledge concerning the financial condition of Fairview Manor Apartments, the separate negotiations and settlement made between the defendants Cash Cole and Everett Nowell, the execution by Cash Cole of a note in apparently the sum of

$25,000.00 to Rushlight, and business transactions between the defendants Cash Cole and Everett Nowell. These references are to matters which are not relevant to the issues raised by said motions.

22. The defendants Cash Cole and Bayview Realty, Inc., have reiterated claims upon which the suit hereinabove mentioned bearing No. 3532 filed in the District of the United States for the Western District of Washington, Northern Division, was based. The suit was dismissed with prejudice and upon stipulation of parties thereto. Said suit sought damages for $699,912.27. It was based on excessive and unreasonable claims involving purported defects in construction which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation. The total amount actually in dispute did not exceed the maximum sum of $20,000.00. The cross-complaint lodged with this court by said defendants covers substantially the same claims which said defendants contend were shortages under the construction contract performed by the Mortensen company. All of these claims and counter-claims were the subject of the settlement involved in this case and were mutually released by the parties hereto. They were also all involved in said case No. 3532, and by stipulation said case was dismissed October 28, 1953, with prejudice. (A certified copy of the complaint in said case and said stipulation and order

were filed with this court at the time of the oral argument on April 3, 1954.)

23. The purpose of this suit filed by the plaintiffs was to resolve the deadlock in the conduct and the affairs of the plaintiff corporation, due to the failure of the board of directors to proceed, to resolve the deadlock among the stockholders and members of said board resulting in paralysis of corporate functions, to end the dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and dissipation of assets and impairment of corporate property by the principal defendants. The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed herein showed many improper acts in management by Cash Cole and members of his family and Nowell: (a) Purchase of auto parts out of funds of the plaintiff corporation for Tom Cole; (b) improper payment of monthly salary of $1,000.00 to Nowell while he was employed full time by the Alaska Freight Lines in Juneau; (c) sending the daughter-in-law of Cash Cole on an extensive trip to the United States and for her personal benefit at the expense of the plaintiff corporation; (d) expenditure of corporate funds for excessive long distance phone calls; (e) payment out of corporation funds for vacation of Cole and members of his family; (f) furnishing of a free apartment and bar for Nowell, which he only occasionally used, but was always available; (g) apartments made avail-

able to members of Cole's family free of rent; (h) exorbitant and unauthorized salaries paid to Cole and Nowell; (i) inefficient management generally and numerous family members of Cash Cole on the payroll; and (j) unauthorized control, failure to account, lack of stockholders' annual meetings and meetings of board of directors, and usurpation of the operation and management of Fairview Manor by the defendants, and dissipation of the assets and funds of the plaintiff corporation.

From the foregoing findings of fact the court makes the following:

Conclusions of Law

I. The defendants, Cash Cole and Bayview Realty, Inc., have failed to sustain any ground under Rule 60 (b) of the Federal Rules of Civil Procedure on which this court can set aside or rescind the stipulation filed October 9, 1953, and executed by the parties hereto, containing their settlement agreement, or vacate the final judgment and decree entered herein.

II. The burden of proving fraud, mental incapacity or any of the other grounds set up in defendants' motion is on them. Fraud, conspiracy, mental incapacity or other grounds alleged cannot be presumed, but must be proved by clear and convincing evidence. The affidavits and the statement of facts contained therein filed by the defendants in support of their motion are legally insufficient to sustain said burden of proof. Said affidavits are fre-

quently argumentative, contain conclusions of fact and not statement of ultimate facts, are conflicting as to matters stated by members of the Cole family, contain considerable duplicity, frequently make assumptions without factual basis or contain legal conclusions, and contain many immaterial matters not pertinent to the issues before this court under said motion of defendants and the motions of the plaintiffs.

III. There is no clear, unambiguous, and convincing proof of fraud, conspiracy, or any of the other acts charged in the motion to rescind the stipulation of the parties filed on October 9, 1953, and to vacate the final judgment.

IV. There is no clear, cogent and convincing proof that at the time of the execution of said stipulation and settlement agreement embodied therein sought to be rescinded by said defendants, that said Cash Cole was mentally incompetent. He knew the nature, character, and effect of his execution of the stipulation and understood the subject matter thereof and the transactions covered by said stipulation.

V. The plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, have completed performance of the terms and conditions of the settlement agreement contained in said stipulation and the final judgment entered thereon but the defendants have not. It is inequitable to rescind said stipulation and the settlement agreement contained

therein and to vacate said final judgment and decree entered thereon without restoring the plaintiffs to their status quo at the time of the execution of said stipulation which said defendants have not offered to do.

VI. The defendants Cash Cole and Bayview Realty, Inc., have affirmed or ratified the settlement agreement contained in said stipulation by failing to disaffirm it without delay from October 9, 1953, and by accepting benefits thereunder until January 8, 1954, when their said motion was filed in this case.

VII. The cross-complaint lodged with this court and which said defendants request leave to file herein and which attempts do include Fairview Development, Inc., as a claimant, covers various purported defects in construction which were substantially the subject matter of case No. 3532 filed by Fairview Development, Inc., against Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, in the District of the United States for the Western District of Washington, Northern Division. All of said claims raised in said complaint are res adjudicata by reason of a final decree entered in said case No. 3532 dismissing said case with prejudice.

VIII. A receiver should be appointed to preserve the assets of Fairview Development, Inc., to collect its income and to protect the interests of the stockholders thereof, until such time as the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V.

Henderson have obtained possession of the capital stock of the plaintiff corporation, have elected a board of directors and officers of said corporation, and have succeeded in bringing up to date all of the corporate records of said corporation so that the interests of all stockholders and creditors of said corporation have been protected.

IX. That under the terms and provisions of the settlement agreement contained in said stipulation filed October 9, 1953, herein, and by reason of the defaults in the performance of the terms and agreements undertaken by the principal defendants, said Cash Cole, Everett Nowell, and Bayview Realty, Inc., the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, are now the owners of and entitled to the 450 shares of stock now appearing in the name of Cash Cole, Bayview Realty, Inc., and Everett Nowell, or one or more of them, as well as the additional 450 shares of stock heretofore or now appearing in the name or names of said individual plaintiffs, and said defendants Cash Cole, Bayview Realty, Inc., a corporation, and Everett Nowell, or one or more of them, and Roy Sumpter, their employees, agents, attorneys and representatives, should be directed to endorse and/or deliver to said individual plaintiffs the certificate or certificates of stock of Fairview Development, Inc., evidencing 900 shares appearing in whole or in part in their name, or one or more of them, or in the name or names of said individual plaintiffs.

Done and Entered this 7th day of May, 1954.

/s/ HARRY E. PRATT,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANTS' MOTION TO VACATE FINAL JUDGMENT; APPOINTING RECEIVER; AND DIRECTING DELIVERY OF CERTIFICATES OF STOCK

This Matter having come on duly and regularly for hearing on the motion of the defendants, Cash Cole and Bayview Realty, Inc., filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to set aside the stipulation of the parties filed in said cause on October 9, 1953, and vacate the final judgment entered thereon on October 10, 1953, and for leave to file a cross-complaint or counter-claim lodged with this court; and further upon the amended motion of the plaintiffs, Fairview Development, Inc., an Alaska Corporation, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., for the appointment of a receiver to take over the management and op-

eration of Fairview Manor Apartments and all other property and assets and income of said plaintiff corporation, Fairview Development, Inc., which motion was filed in the above cause on March 19, 1954; and further upon the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their name, or names, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; and the plaintiffs in the above-entitled cause being represented by their attorneys, Joe Diamond and Earle Zinn, and Collins and Clasby, by Walter Sczudlo, and the defendants being represented by their attorneys, Bell & Sanders and Warren A. Taylor, by Warren A. Taylor, at said hearing and argument on said motions; and the court having considered the settlement agreement embodied in said stipulation filed in this cause on October 9, 1953, and the final judgment and decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, and the various proceedings and the trial had in this cause, and the affidavits

filed by said defendants Cash Cole and Bayview Realty, Inc., in support of their said motion above mentioned and in opposition to plaintiffs' motions, and the various affidavits filed by the plaintiffs in opposition to said motion of defendants and in support of their motions for a receiver and to show cause hereinbefore mentioned, and all the pleadings and proceedings heretofore had herein, and having heard statements of counsel and their arguments and being otherwise fully advised in the premises; and the Court having entered heretofore its findings of fact and conclusions of law.

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That the motion of said defendants, Cash Cole and Bayview Realty, Inc., a corporation, filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to set aside or rescind the stipulation of the parties filed in this cause on October 9, 1953, and vacate the final judgment and decree entered herein on October 10, 1953, be and it is hereby denied.

2. That the motion of said defendants included within the above and foregoing motion to set aside said stipulation and vacate said final judgment and decree, for leave to file an amended answer and cross-complaint to plaintiffs' complaint, be and it is hereby denied.

3. That the amended motion of the plaintiffs,

Fairview Development, Inc., an Alaska corporation, Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., filed herein on March 19, 1954, for the appointment of a receiver to take over the management and operation of Fairview Manor Apartments and all other property and assets of the plaintiff corporation, Fairview Development, Inc., and to collect all its income and receipts, be and it is hereby granted.

4. That the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their names, or name, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, be and it is hereby granted as hereinafter more fully provided.

5. That Robert E. Sheldon of the City of Fairbanks, Alaska, be and he is hereby appointed re-

ceiver for the property involved in the above-entitled cause, and all assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that said receiver shall enter into possession immediately of the property hereinbefore mentioned and collect and preserve the rents, issues and profits thereof; that upon entering upon his duties said receiver shall file with this court a bond in the penal sum of $50,000.00 as security, to be approved by this court, and conditioned upon the faithful performance of his duties as such receiver.

6. That any party or parties now in possession of said premises, or any portion or portions thereof, or that may come into possession of said premises and the improvements thereon, or any portion or portions thereof, attorn to said receiver.

7. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever, be and they are hereby removed and disassociated from all management or operation, or any aspects thereof, of Fairview

Manor Apartments, or any other matter relating to said project, or to the affairs of the plaintiff corporation, Fairview Development, Inc., and said defendants, and each of them be and they are hereby directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation or with said corporation itself; that the present directors and officers of said Fairview Development, Inc., except Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and each of said directors and officers be and they are hereby directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver but are directed and enjoined to forthwith surrender all said property and all the corporate books and records to said receiver without delay, including all bank deposits and other assets of said plaintiff corporation, Fairview Development, Inc.

8. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., a corporation, and each of them, Roy Sumpter of Seattle, Washington, their heirs, special representatives, successors, assigns, agents, attorneys, employees, and any representative whatsoever, be and they are hereby directed and enjoined to deliver within 20 days from the date hereof the certificate or certificates of stock issued by said plaintiff corporation, Fairview Development, Inc., to said Cash Cole, Everett Nowell, and Bayview Realty, Inc., or one or more of them,

evidencing 450 shares of capital stock of said corporation, and any other certificate or certificates for an additional 450 shares of stock of said corporation heretofore or now appearing in the name of one or more of said individual plaintiffs, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson without delay, conveying thereby all their right, title and interest in and to said capital stock in payment and satisfaction of the obligation, which said defendants Cash Cole, Everett Nowell, and Bayview Realty, Inc., agreed to secure in said stipulation; and said Fairview Development, Inc., be and it is hereby directed to cancel said certificate or certificates of stock and to issue in lieu thereof for said shares of capital stock a new certificate to said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson. Said Roy Sumpter is hereby further directed and enjoined to deliver any other certificate or certificates of stock held by him evidencing shares of capital stock issued to any one or more of the plaintiffs including said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, without delay.

Entered and Done this 7th day of May, 1954.

/s/ HARRY E. PRATT,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered May 7, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE NAME OF FAIRVIEW DEVELOPMENT, INC., AS PARTY PLAINTIFF

Comes Now Cash Cole, individually and as a stockholder of Fairview Development, Inc., and stockholder and President of Bayview Realty, Inc., and moves this Honorable Court for an Order striking from the title the name of Fairview Development, Inc., as party plaintiff, in the above-entitled action, upon the following grounds:

1. That the said corporation, Fairview Development, Inc., did not at any time by its Board of Directors, authorize or empower Cliff Mortensen, Frank A. Henderson or Nelse Mortensen to employ counsel to act for and on behalf of the said corporation in cause No. 7298 on file herein.

2. That at no meetings of the Board of Directors mentioned in plaintiffs' Complaint did plaintiffs utilize the services of Kenneth Kadow or Roy Sumpter, the arbitrators provided by the parties hereto.

3. That in the Complaint on file herein there is an allegation that in case of a deadlock in the Board of Directors that the final decision in the matters over which the Directors are deadlocked shall be determined by Kenneth Kadow, or in his inability to act, by Roy Sumpter, of Seattle, Washington, but there are no allegations that the plaintiff members of the Board of Directors called upon the said Ken-

neth Kadow or Roy Sumpter to exercise their right as arbitrators in any matter whatsoever.

4. That the said corporation, Fairview Development, Inc., did not adopt any resolution or motion or take any action in regard to employment of the law firm of Collins and Clasby, Fairbanks, Alaska, to institute an action for and on behalf of Fairview Development, Inc., and against the defendants herein named.

Dated at Fairbanks, Alaska, this 9th day of June, 1954.

/s/ WARREN A. TAYLOR,
Of Defendants' Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

ORDER
No. 7298

The plaintiffs were represented by Walter Sczudlo; the defendant, Cash Cole, by Eugene V. Miller.

Respective counsel had argument on the above-named defendant's motion to strike the name of Fairview Development, Inc., from the title in this cause.

It was Ordered that the motion be denied.

* * *

Entered June 17, 1954.

[Title of District Court and Cause.]

NOTICE OF HEARING

Notice Is Hereby Given that on the 4th day of June, 1954, at the hour of 1:00 o'clock in the afternoon, or as soon thereafter as the same may be heard, the court will be requested to set a bond for costs, or supersedeas bond, or both pursuant to Rules 73(c) and 73(d) of the Federal Rules of Civil Procedure, or to strike or dismiss the notice of appeal heretofore filed on or about May 10, 1954, by certain defendants, in the courtroom usually occupied by the court at the courthouse, Fairbanks, Alaska. At which time and place you may appear if you see fit.

COLLINS AND CLASBY,

By /s/ WALTER SCZUDLO,
Of Counsel for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

ORDER

Whereas, heretofore on May 7, 1954, this court entered an order, which, among other things, appointed Robert E. Sheldon of the City of Fairbanks, as receiver for the property involved in the above-entitled cause, and all the assets and corporate records of the plaintiff corporation, Fairview Develop-

ment, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; and it appears and the court finds that said receiver on the same day filed his written oath herein and accepted said appointment, and heretofore filed herein a receiver's bond in the penal sum of fifty thousand dollars ($50,000.00) as security, which was heretofore approved by this court, and was conditioned upon the faithful performance of his duties as such receiver, all in accordance with the terms and provisions of said order, and said Robert E. Sheldon is now the acting and duly qualified receiver in this cause; and it further appearing desirable and in the interests of all parties to this proceeding to direct certain procedures for said receiver to observe; and the court being fully advised in the premises,

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That said Robert E. Sheldon, as receiver as aforesaid, make a written monthly accounting of all his receipts and disbursements for each calendar month on or before the 10th day of the month succeeding the period covered by each report, the first report to be made on or before the 10th day of June, 1954.

2. That said receiver will deposit all receipts and collections made by him as such receiver in a checking account to be opened by him in his name as receiver in this case with the First National Bank of Fairbanks, Alaska.

3. That said receiver will make all expenditures for any purpose whatsoever in connection with said receivership only by check against said account hereinbefore mentioned signed by him, and countersigned by Ray Kohler, public accountant, who may be employed by said receiver to maintain his books of account.

4. That said receiver will secure the approval of this court for any unusual expenditures, except the usual, customary and routine payments required in connection with the operation and maintenance of the property and assets of Fairview Development, Inc., and the operation and conduct of Fairview Manor Apartments.

5. That said receiver may reimburse himself or pay the premium for his receiver's bond out of the income of the receivership estate.

Entered and Done this 10th day of May, 1954.

/s/ HARRY E. PRATT,
United States District Judge.

[Endorsed]: Filed and entered May 10, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaskan corporation, and Fairview Development, Inc., an Alaskan corporation; Bayview Realty, Inc., an Alaskan corporation, and Fairview Development, Inc., hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled cause, and from the Order overruling defendant's Motion to set aside and vacate said final judgment and the stipulation upon which said judgment was based, entered in this action on the 7th day of May, 1954.

BAILEY E. BELL,
WILLIAM SAUNDERS,
WARREN A. TAYLOR,
Attorneys for Appellant.

By /s/ WARREN A. TAYLOR,
Of Appellant's Attorneys.

Receipt of copy acknowledged.
[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

ORDER

This Matter Coming on to Be Heard upon motion of Fairview Development, Inc., an Alaska corpora-

tion, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., plaintiffs, by their attorneys, Collins and Clasby, to set a bond for costs, or supersedeas bond, or both, pursuant to Rule 73(c) and 73(d) of the Federal Rules of Civil Procedure, or to strike or dismiss the notice of appeal heretofore filed on or about May 10, 1954, by the defendants, Cash Cole, individually and as an officer and director of Bayview Realty, Inc., and Bayview Realty, Inc., an Alaska corporation; and upon the further motion of said plaintiffs by their said attorneys to strike from said notice of appeal the name of Fairview Development, Inc., one of the plaintiffs in the above-entitled cause because said plaintiff has at all times been represented in this cause by said Collins and Clasby and Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester and not by Bailey E. Bell and William Sanders and Warren A. Taylor; and the court having examined the pleadings and records in this cause, and having heard arguments of counsel and being otherwise fully advised in the premises,

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That the motions of said plaintiffs be and they are hereby granted as hereinafter more fully provided.

2. That an appeal cost bond be and it is hereby

set in the sum of $1,500.00, to be executed by said defendants, Cash Cole and Bayview Realty, Inc., appearing in said notice of appeal, and by a corporate surety, such surety to be a bonding company appearing on the approved list of bonding companies maintained by The Treasury Department of the United States; and that said bond be filed at or before the filing of the designation of the record on appeal by said defendants.

3. That said defendants, Cash Cole and Bayview Realty, Inc., may file a supersedeas bond in the sum of $250,000.00 in lieu of said appeal cost bond, such supersedeas bond to be executed by said defendants, Cash Cole and Bayview Realty, Inc., appearing in said notice of appeal, and by a corporate surety, such surety to be a bonding company appearing on the approved list of bonding companies maintained by The Treasury Department of the United States.

4. That the name of Fairview Development, Inc., an Alaska corporation, one of the plaintiffs herein, be and it is hereby stricken from said notice of appeal.

Entered and Done this 4th day of June, 1954.

/s/ HARRY E. PRATT,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered June 4, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings in this cause listed below comprise all proceedings requested by the Amended Designation of Contents of Record on Appeal of defendant Cash Cole, the appellant, and the Amended Designation of Additional Record for Printing of the Plaintiffs and Appellees, viz.:

1. Complaint.
2. Answer.
3. Stipulation.
4. Final Decree and Order.
5. Motion to Set Aside and Vacate the Stipulation and Judgment based thereon.
6. Affidavits of Cash Cole, Tom Cole, and Joseph M. Ribar in Support of Motion to Set Aside Stipulation and Judgment based thereon.
7. Affidavits of Tom Cole, Ruth Cole, and Cash Cole in Support of Motion to Set Aside Judgment and in Opposition of Motion for Appointment of Receiver.
8. Affidavits of Cliff Mortensen, Frank V. Henderson, Supplemental Affidavit of Mortensen and Henderson, Everett Nowell, Joe Diamond and Earle Zinn, W. A. Rushlight, and Joseph M. Ribar, M.D., in Opposition to the Motion to Set Aside and Vacate the Stipulation and Judgment based thereon.
9. Amended Answer.

10. Cross-Complaint.

11. Motion for Appointment of Receiver.

12. Amended Motion for Appointment of Receiver.

13. Supplemental Affidavit of Everett Nowell in Support of Motion for Appointment of Receiver.

14. Supplemental Affidavit of Cliff Mortensen in Support of Amended Motion for Appointment of Receiver.

15. Affidavits of Cash Cole and Allene Hendricks in Opposition to Plaintiffs' Motions for Appointment of Receiver and Temporary Injunction and in Support of Motion to Vacate Stipulation and Judgment.

16. Findings of Fact and Conclusions of Law.

17. Order Denying Defendants' Motion to Vacate Final Judgment; Appointing Receiver; and Directing Delivery of Certificate of Stock.

18. Motion to strike name of Fairview Development, Inc., as Party Plaintiff.

19. Minute Order denying above Motion.

20. Notice of Hearing of Plaintiffs in re Bonds.

21. Order in re Bonds.

22. Order directing Procedure of Receiver.

23. Bond for Costs on Appeal.

24. Amended Designation of Contents of Record on Appeal of Defendant and Appellant.

The following is the list of Proceedings requested by the Plaintiffs and Appellees in their Amended Designation of Additional Record for Printing, viz.:

1. Appearance of counsel for defendants.
2. Motion for Appointment of Receiver.
3. Affidavits of Cliff Mortensen and Everett Nowell in Support of Plaintiffs' Motion for Appointment of Receiver and Temporary Injunction.
4. Affidavit of Cash Cole regarding Corporate Minutes.
5. Affidavit of Cole regarding Agreement of December 1, 1951.
6. Affidavit of Cole regarding his letter of March 8, 1953.
7. Affidavit of Cliff Mortensen in Opposition to Affidavits of Cash Cole and Everett Nowell, dated August 3, 1953.
8. Affidavit of Cliff Mortensen regarding letter of Nowell, dated May 24, 1951.
9. Affidavits of Frank V. Henderson, J. F. Campbell, and J. E. Swanson, Jr., filed August 14, 1953.
10. Order Appointing Receiver.
11. Notice of Withdrawal of Attorneys.
12. Notice of Default and Demand.
13. Motion to Show Cause.
14. Certified copy of Complaint in cause No. 3532, entitled Fairview Development, Inc., a Corporation, vs. Nelse Mortensen Alaska, Inc., a Corporation, and filed in the District Court for the Western District of Washington.
15. Motion to strike Notice of Appeal.
16. Transcript of Proceedings of June 4, 1954.
17. Receiver's Petition No. 1.
18. Order on Receiver's Petition No. 1.

19. Receiver's Monthly Report and Account for May, 1954.

20. Amended Designation of Additional Record for Printing.

21. Transcript of Proceedings on May 5, 6, and 8, 1953, at Fairbanks, Alaska. (Separately Bound.)

Witness my hand and the seal of the above-entitled Court this 10th day of July, 1954.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14424. United States Court of Appeals for the Ninth Circuit. Cash Cole, et al., Appellants, vs. Fairview Development, Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska, Fourth Division.

Filed July 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14424

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. That the Court erred in overruling defendants' Motion to Set Aside and Vacate the Stipulation and Judgment Based Thereon.

2. That the Court erred in appointing a receiver for Fairview Manor, the property of Fairview Development, Inc.

3. That the Court erred in setting the amount of the Receiver's Bond in the sum of $50,000.00 and setting the amount of the Supersedeas Bond on appeal in the sum of $250,000.00, the same to be a bond written by a surety company.

4. That the Court erred in sustaining plaintiffs' Motion increasing bond for costs on appeal from $250.00 to $1,500.00, and requiring said surety to be a corporate surety.

5. That the Court erred in denying appellants' Motion for leave to file amended Answer and Cross-Complaint.

6. That the allegations of the Complaint do not constitute a cause of action against the defendants.

7. (a) That the Court erred in its Findings of Facts No. 1. That there was dissension and discord as to who comprised the directorate; disposition of corporate assets; impairment of corporate property and income and profits by the defendants; exercise of corporate powers without authority of the Board of Directors.

(b) That the Court erred in its Finding of Facts No. 3 that Cash Cole purportedly suffered a heart attack, when, in fact, the testimony was uncontradicted that he did, in fact, suffer such attack.

(c) That the Court erred in its Finding of Facts No. 4 in referring to Cash Cole's serious heart condition as "purported illness."

(d) That the Court erred in its Finding of Facts No. 6 that Cash Cole had failed to deposit Fairview Development, Inc., stock in escrow, because said stock was being held in escrow by Roy Sumpter, and said Cash Cole was prevented from securing said stock to place the same in escrow with a bank at Fairbanks, Alaska, by said plaintiffs and their attorneys; and that the Court erred in failing to find that the claim of Pilip & Butt Painting Contractors and C. H. Keaton were not valid claims

against Fairview Development, Inc., but were, in fact, obligations of the other plaintiffs; that the sum of $8,800.00, as shown by the evidence, was money held on deposit with the National Bank of Commerce in Seattle for the purpose of completing the landscaping of Fairview Manor; that the Rushlight claim was not a valid claim against Fairview Development, Inc., but was, in fact, a valid claim against the other plaintiffs.

(e) That the Court erred in its Finding of Facts No. 9 in that the evidence conclusively showed that said Cash Cole was so ill at the time of the execution of the Stipulation in question that he could not read and did not know the intent and import of the documents.

(f) That the Court erred in its Finding of Facts No. 9 that Tom Cole, Ruth Cole and Cash Cole participated in the negotiations mentioned in said finding, as the uncontradicted testimony showed that Mrs. Cole and Tom Cole had no knowledge of the state of the negotiations, and that Jaureguy did not participate in the said negotiations.

(g) That the Court erred in its Finding of Facts No. 9 in that Cash Cole was competent and understood the nature of the negotiations, whereas the only medical testimony states that Cash Cole was a very sick man and not able to attend to business affairs and that medicine given to Cole would dilate his eyes for at least three days so that he could not read, which were the days in which the negotiations

were carried on. That there are no statements in plaintiffs' affidavits that deny that Cash Cole was unable to read during the period of a week following the heart attack.

(h) That the Court erred in its Finding of Facts No. 13, in that the ultimate facts indicate that the plan or scheme was successful and the plaintiffs did succeed in securing the property mentioned without adequate consideration for the same. The evidence was sufficient to show that the facts set forth by the defendants were of such a nature as to mislead and overreach Cash Cole and successfully carry out the scheme of the plaintiffs.

(i) That the Court erred in its Finding of Facts No. 15, in that the claims of Rushlight & Co., Pilip & Butt Contractors were obligations of the other plaintiffs and not of Fairview Development, Inc., or the defendants. Plaintiffs were only paying an obligation by reason of subcontracts with the said concerns.

(j) That the Court erred in its Finding of Facts No. 16, in that the claims and liens affected only the plaintiffs, Mortensens and Henderson, and not Fairview Development, Inc., or the defendants.

(k) That the Court erred in its Finding of Facts No. 17, in that the pending causes mentioned in said Finding were not actions involving Fairview Development, Inc., and the defendants, except Cause No. 3532, Fairview Development, Inc., versus Nelse Mortensen-Alaska, Inc.

(l) That the Court erred in its Finding of Facts No. 19, in that said Finding is contrary to the evidence.

(m) That the Court erred in its Finding of Facts No. 20, in that said Finding is contrary to the evidence.

(n) That the Court erred in its Finding of Facts No. 21, as said Finding of Fact is contrary to the evidence, as the note payable to Rushlight, made at the same time and place as the Stipulation sought to be set aside, was without consideration, and that the fact is corroborative of the plan and scheme entered into by plaintiffs and Rushlight to defraud defendants.

(o) That the Court erred in its Finding of Facts No. 22, in that there was no evidence that Cause No. 3532, Fairview Development, Inc., versus Nelse Mortensen-Alaska Company was dismissed, and further that Nelse Mortensen-Alaska Co. is not a party to this suit, and any dismissal with prejudice in that cause would not prejudice the defendants in the present cause; and for the further reason that the plaintiffs instituted the present action, and the filing of a Cross-Complaint is permissible.

(p) That the Court erred in its Finding of Facts No. 23, in that the Finding is contrary to the evidence.

(q) That the Court erred in its Conclusions of Law, as they are not based upon its Findings of Facts predicated upon the evidence.

8. That the Court erred in overruling defendants' Motion to strike Fairview Development, Inc., from the title of plaintiffs' Complaint.

BELL & SANDERS, and
WARREN A. TAYLOR,

By /s/ WARREN A. TAYLOR,
Of Appellants' Attorneys.

Service of copy acknowledged.

[Endorsed]: Filed June 29, 1954.